THE NEXT ANNUAL MEETING WILL BE HELD AT MEMPHIS, TENN., OCT. 23-25

AMERICAN BAR ASSOCIATION JOVRNAL

JUNE, 1929

American Law Institute Holds Seventh Annual Meeting

Criminal Legislation for 1928
By JOSEPH P. CHAMBERLAIN

Chicago Bar Takes Unusual Step

Review of Recent Supreme Court Decisions
By EDGAR BRONSON TOLMAN

Civil Law Theory and Common Law Practice
By JOHN BARKER WAITE

Reasons For Joining The American Bar Association

Judicial Execution by Burning at Stake
By WILLIAM RENWICK RIDDELL

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A FEW FACTS ABOUT THE TRAVELERS

¶The people of the United States began in 1864 insuring themselves in The Travelers against financial loss due to accident. At that time The Travelers was the only company writing that form of protection, which is now so common.

¶More than twice as many business and professional men are protected by Travelers Accident Policies than by those of any other company. For this protection they paid The Travelers $10,848,862.52 in 1928.

¶Travelers Life Insurance has been since 1865 the choice of those who appreciated guaranteed low-cost insurance.

¶Over four and one-half billion dollars for future delivery has been arranged through Life Insurance in The Travelers.

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¶Contracts for 67% more Liability and Compensation insurance are in force with The Travelers than with any other company. Business men paid $45,470,453.16 for this protection.

THE LARGEST MULTIPLE-LINE INSURANCE ORGANIZATION IN THE WORLD

¶More than 68,000 employers of labor are insured under Travelers compensation policies.

¶To assist policyholders in accident and fire prevention efforts, The Travelers maintains an Engineering and Inspection Division with a personnel numbering 690. Since the establishment of this division the Companies have expended in such service $22,502,724. In 1928 alone, 472,529 inspections were made.

¶The Travelers is deservedly popular among business men who need the protection of Burglary, Boiler and Plate Glass insurance.

¶More than 40,000 agents and brokers have chosen The Travelers as the company in which to insure their clients. Travelers Accident Tickets may be purchased from 5,000 Accident Ticket agents.

¶To serve policyholders promptly and efficiently, no matter where they may be, The Travelers has established throughout the United States and Canada, 214 main claim service offices. Over 1,600 people devote their time to this service. Over 936,000 bank drafts and checks for policy benefits were issued in 1928. The total paid to policyholders or their beneficiaries to date is $735,186,736.

¶The total income of The Travelers Companies in 1928 was $207,398,094.51, of which $180,460,463.51 was paid by policyholders for the protection of Travelers multiple lines.

FINANCIAL CONDITION JANUARY 1, 1929

	The Travelers Insurance Company	The Travelers Indemnity Company	The Travelers Fire Insurance Company
Assets	$553,857,160	$20,601,807	$14,598,364
Reserves and all other Liabilities	510,803,736	12,211,472	10,182,044
Capital	17,500,000	3,000,000	2,000,000
Surplus as regards Policyholders	43,053,424	8,390,335	4,416,320

THE TRAVELERS

HARTFORD, - - - - - - - CONNECTICUT

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AMERICAN BAR ASSOCIATION
JOVRNAL

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President Hoover's New Policy

THE Presidential policy of publishing a list of the endorsers of men nominated for places on the Federal Circuit and District Bench was orally announced at the White House executive offices on April 18. The first list was made public in connection with nominations for eleven judgeships, including four on the United States Circuit Court of Appeals, sent to the Senate on that date. This new departure has attracted considerable attention from the press and the profession. The Bar will no doubt be interested in this first list of indorsers, which contains the names of many outstanding men at the Bar and on the Bench. Judge A. Lee Wyman, nominated for District Judge, District of South Dakota, has the distinction of having a Bishop among his sponsors. The names are taken from the *United States Daily* of April 20:

Judge George T. McDermott

Endorsements in favor of George T. McDermott of Kansas, to be United States Circuit Judge, Tenth Circuit:

Arthur Capper, United States Senator from Kansas; Samuel W. Williston, of Harvard University; Homer W. Berger, Kansas City, Mo.; Robert E. Lewis, John B. Sanborn, United States District Judges; Robert Stone, attorney, Topeka, Kans.; Irving M. Platt, president, Geary County Bar Association, Junction City, Kans.; Bruce W. Sanborn, attorney, St. Paul, Minn.; Charles D. Shukers, president, Kansas Bar Association, Independence, Kans.

J. Wirth Sargent, attorney, Grover Pierpont, Judge of District Court, Wichita, Kans.; Wichita Bar Association, by B. F. Alford, secretary; G. L. Light, Judge, 39th District, Liberal, Kans.; Charles L. Kagey, president, Mitchell County Bar Association, Beloit, Kans.; A. C. Paul, attorney, Minneapolis, Minn.; George H. Whitcomb, District Judge, Alfred M. Landon, chairman, State Central Committee, Topeka, Kans.

Wilbur F. Booth, United States Circuit Judge, Minneapolis, Minn.; Bronson Cutting, United States Senator from New Mexico; Arba S. VanValkenburgh, United States Circuit Judge, Kansas City, Mo.; George H. Whitcomb, George A. Kline, Otis E. Hungate, District Judges, Topeka, Kans., together with 68 members of the Topeka, Kans., bar, and many other members of the bar, officials and citizens throughout the States of the 10th Circuit.

Judge O. L. Phillips

Endorsements in favor of Orie L. Phillips of New Mexico, to be United States Circuit Judge, Tenth Circuit:

S. G. Bratton, Bronson Cutting, United States Senators from New Mexico; O. A. Larrazolo, former United States Senator from New Mexico; Robert E. Lewis, William S. Kenyon, Arba S. VanValkenburgh, Wilbur F. Booth, United States Circuit Judges; John B. Sanborn, George T. McDermott, J. Foster Symes, Colin Neblett, United States District Judges.

Thomas B. Harlan, attorney, St. Louis, Mo.; Frank Lee, United States attorney, Muskogee, Okla.; William Wallace, Jr., former assistant attorney general, New York; J. Wirth Sargent, attorney, Wichita, Kans.; A. C. Paul, attorney, Minneapolis, Minn.; Gurney E. Newlin, president, American Bar Association, Los Angeles, Calif.; Henry McAllister, attorney, Denver, Colo.; James G. McNary, Los Angeles, Calif.; George R. Craig, attorney, Albuquerque, N. M.

C. J. Roberts, C. M. Botts, J. O. Seth, Frank Vallacott, Carl H. Gilbert, committee of the New Mexico Bar; Leslie J. Lyons, attorney, Kansas City, Mo.; William G Haydon, former president of State Bar Assn., East Las Vegas, N. M.; R. C. Dillon, governor of New Mexico; W. H. H. Piatt, president, Kansas City Bar Assn, Kansas City, Mo.; Preston C. West, president, and 12 former presidents of the State Bar Assn. of Oklahoma.

John J. Kenney, district attorney, Santa Fe, N. M.; D. E. Palmer, president, Shawnee Co. Bar Assn., Topeka, Kans.; George H. Whitcomb, George A. Kline, Otis E. Hungate, judges of the District Court, with 68 members of the Topeka (Kans.), bar; Frank W. Parker, John C. Watson, justices of the Supreme Court of New Mexico; M. A. Otero, Jr., attorney general of New Mexico; and many other members of the bar, officials and citizens in the States of the 10th Circuit.

Judge A. K. Gardner

Endorsers of Archibald K. Gardner for appointment as United States Circuit Judge, Eighth Circuit:

James D. Elliott, United States District Judge, South Dakota; Frank R. Fisher, Judge of the Circuit Court; A. A. Chamberlain, State chairman, State Central Committee; F. G. Bohri, president of the Clark County Bar Association; Thomas Sterling, former United States Senator; Frank E. Reed, Judge of the District Court, Minneapolis, Minn.; E. Milligan, Republican National Committeeman, Aberdeen, S. D.; H. E.

Fry, Judge, District Court, Boone, Iowa; W. C. Ratcliff, Judge, 15th Judicial District of Iowa, Red Oak, Iowa; Carl G. Sherwood, Presiding Judge, Supreme Court of South Dakota.

Dwight Campbell, Judge, Supreme Court of South Dakota; Samuel C. Polley, N. D. Burch, Walter G. Miser, Howard G. Fuller, South Dakota Supreme Court Commissioners; M. Q. Sharp, Attorney General, State of South Dakota; W. J. Bulow, Governor of South Dakota.

S. W. Clark, former United States Attorney, District of South Dakota; Charles A. Dewey, Judge, District Court, Des Moines, Iowa; Mathias Baldwin, Judge District Court, Minneapolis, Minn.; John Nicholson, president, Codington County Bar Association, S. Dak.; Patrick J. Nelson, Judge, District Court, Dubuque, Iowa; M. E. Hutchinson, Judge, 16th Judicial District of Iowa, Lake City.

Committee representing Beadle County, S. Dak., Bar: Sherwood A. Clock, Judge of the District Court, Hampton, Iowa; Miles W. Newby, Judge of the District Court, Sioux City, Iowa; F. C. Gilchrist, chairman, Judiciary Committee of the State Senate, Iowa; Ralph C. Pritchard, Member of the Houses of Representatives, Iowa; H. A. Evans, president, Iowa State Bar Association, and many other prominent members of the Bar, officials and citizens in South Dakota, Iowa, Minnesota and other States of the 8th Circuit.

Judge J. M. Woolsey

Endorsers of John M. Woolsey, for United States District Judge, Southern District of New York:

Judiciary Committee of the Association of the Bar of the City of New York; Charles Evans Hughes; Thomas W. Swan, Augustus N. Hand, Edmund Waddill, Jr., Martin T. Manton, United States Circuit Judges; Thomas D. Thacher, John C. Knox, United States District Judges; Charles D. Hilles, William H. Hill, H. Edmond Machold.

Frederic R. Coudert, Howard Thayer Kingsbury, Goldthwaite H. Dorr, William M. Evarts, Charles E. Hughes, Jr., Robert M. Marsh, Mark W. Maclay, Cortlandt Nicoll, Ezra P. Prentice, Beverly R. Robinson, Elihu Root, Jr., Kenneth M. Spence, Henry Root Stern, all of New York.

Judge F. G. Caffey

Endorsers of Hon. Francis G. Caffey for United States District Judge, Southern District of New York:

Judiciary Committee of the Association of the Bar of the City of New York; Charles Evans Hughes, John W. Davis, Augustus N. Hand, United States Circuit Judge; Henry S. Wardner, New York; Samuel Seabury, New York; William N. Dykman, Brooklyn; Charles S. Haight, New York; Frank L. Polk, New York; Adelbert Moot, Buffalo.

Thomas W. Swan, United States Circuit Judge; George W. Wickersham, John Lord O'Brian, Buffalo; Henry G. Ward, New York; Eldon Bisbee, New York; William D. Guthrie, New York; Cornelius J. Smythe, New York; Carl A. Mead, New York; George Whitefield Betts, Jr., New York; Benjamin N. Cardozo, Chief Judge, Court of Appeals, State of New York; Thomas D. Thacher, John C. Knox, United States District Judges.

Judge A. C. Coxe

Endorsements for Alfred C. Coxe to be United States District Judge, Southern District of New York. Among those who endorsed Mr. Coxe are:

Charles Evans Hughes, Learned Hand, Thomas W. Swan, Augustus N. Hand, United States Circuit Judges; George Whitefield Betts, Jr., attorney; Lansing P. Reed, New York; Morris Leon, New York; Charles D. Hilles, H. Edmond Machold, William H. Hill, Kenneth M. Spence, New York; Thomas Ewing, attorney, New York; New York Patent Law Association; Judiciary Committee of the Association of the Bar of the City of New York.

Judge C. G. Galston

Endorsements for Clarence G. Galston to be United States District Judge, Eastern District, New York. Among those who endorsed Mr. Galston are:

Board of Governors, New York Patent Law Association; George W. Wickersham; Nathan Miller, New York; Robert B. Bacon, House of Representatives; Henry W. Holmes, dean, Graduate School of Education, Harvard University.

C. C. Burlingham, Henry W. Taft, Judge Learned Hand, James A. Foley, Surrogate, New York; Thomas W. Churchill, George H. Taylor, Jr., Justices, Supreme Court, New York; Charles D. Hilles, William H. Hill, H. E. Machold, Frank L. Polk.

Frederick Crane, Judge, New York Court of Appeals; George W. Schurman, New York; Henry A. Wise, New

York; Joseph M. Proskauer, Justice Supreme Court, New York; Kenneth M. Spence, attorney, New York; William Houston Kenyon, New York; Dean Emory, attorney, New York.

Jeremiah T. Mahoney, Justice Supreme Court, New York; William Barclay Parsons, Hubert Howson, Maurice Hotchner, Charles A. Jacobson, C. J. Sawyer, George P. Nicholson, Justice George H. Taylor, Jr., Hamilton C. Risaby, Robert H. Neilson, David C. Bennett, Edwin J. Prindle; F. B. Delehanty, Justice of the Supreme Court, New York.

Judge A. A. Wheat

Endorsements for Alfred A. Wheat to be Justice, Supreme Court, District of Columbia. Among those who have commended Mr. Wheat for judicial positions from time to time are:

George W. Wickersham; Charles Downer Hazon, head of Department of History, Columbia University; Hon. Martin T. Manton, Judge Learned Hand, United States Circuit Judges; William Church Osborn, New York; Hon. Charles W. Littlefield, New York; Hon. Charles C. Burlingham, New York; former Justice Samuel Seabury, New York; Isidor J. Kresel, New York; Morton C. Finch, New York; Francis G. Caffey, New York; James M. Beck, former Solicitor General; John S. Wise, Jr.; James A. O'Gorman, former United States Senator; George Gordon Battle; Charles S. Whitman, former Governor of New York; Edwin R. Finch, Associate Justice Supreme Court, New York; Benjamin N. Cardozo, Chief Justice of the New York Court of Appeals; James W. Wadsworth.

Judge J. Lyles Glenn

Endorsers of J. Lyles Glenn, of Chester, S. C., for United States District Judge for South Carolina. Mr. Glenn was endorsed by Senator E. D. Smith, South Carolina; by resolution of the House of Representatives, South Carolina, passed March 14, 1929; by resolution of the Bar Associations of Chester, Winnsboro, Lancaster, York, Sumter, Florence, and Manning Counties. His qualifications were commended by a large number of State Judges, public officials, prominent citizens and members of the Bar.

Judge A. Lee Wyman

Endorsers of A. Lee Wyman, for United States District Judge, District of South Dakota:

W. H. McMaster, United States Senator; Peter Norbeck, United States Senator; Rt. Rev. Hugh L. Burleson, Bishop of South Dakota; W. C. Lusk, of Yankton, S. Dak.; Opie Chambers, secretary of the Yankton Chamber of Commerce; A. W. Donaldson of the Missouri River Navigation Association, Yankton, S. Dak.; also many other prominent lawyers and citizens of South Dakota.

Commerce Committee Meeting

PURSUANT to a long established custom, public meetings of the Commerce Committee of the American Bar Association were held in New York City on Tuesday, Wednesday, and Thursday, March 26, 27, and 28, 1929. The matters of greatest interest and importance considered at the meetings were the proposed amendments to the anti-trust laws; a uniform nomenclature for bonds; bills of lading for carriage of goods by sea, and the revision of the calendar to provide for a thirteen-month year.

Among other matters considered were the United States contract and sales bill; a bill providing for the payment of interest on judgments against the United States; amendments to the federal arbitration law; bill relating to the settlement of industrial disputes; bill relating to motor vehicles used in interstate commerce; instruments relating to interstate and foreign negotiable paper, fire insurance policies and warehouse receipts; and the regulation of the sale and transportation of pistols in interstate commerce.

The entire day of March 27th was devoted to a discussion of the anti-trust laws. Seven of the eight gentlemen who addressed the committee favored legislative modifications of the anti-trust acts, while one expressed the view that the existing statutes are sufficiently clear and workable.

At the request of President Newlin, the committee gave consideration to a suggestion of co-operation made to the Association by the President of the Investment Bankers Association in the matter of endeavoring to obtain uniform nomenclature for bonds. The tendency to give an issue of bonds a name to which it is not entitled seems to be rather common among certain classes of investment houses and lawyers. A report on the subject had been prepared and was presented to and adopted by the committee, setting forth its views with reference to bond nomenclature and the chairman of the committee was authorized to take whatever steps were necessary to co-operate with the committee of the Investment Bankers Association to bring about more uniform practice in the nomenclature of bonds.

All five members of the committee attended each session of the meetings. Their names follow: Rush C. Butler, Chairman; Julius Henry Cohen, Charles R. Fowler, Arthur M. Geary and Thomas Hunt.

Ohio Lawyers Strike at Improper Practices

IN a petition filed with the Ohio Supreme Court on June 29, 1928, a special committee of the Cleveland Bar Association set forth "on information and belief" that a bad condition of affairs existed in Cuyahoga County, involving the soliciting and buying of personal injury claims, the conduct of claims departments of large corporations, the securing of divorces by fraud, and the influence of organized crime on the enforcement of the criminal law. It asked the Court to order a judicial investigation of the situation and also "of any other illegal and improper practices on the part of members of the Bar of Cuyahoga County."

On January 10 of the present year the Supreme Court, through Chief Justice Carrington T. Marshall, replied that it had "reached the conclusion that such investigation was unnecessary to accomplish the announced ultimate purpose, towit, the adoption by the Court of uniform standards of professional conduct and uniform rules of discipline which shall be effective throughout the State." It therefore suggested that the Cleveland Committee formulate a set of rules of conduct and ethics for the guidance of lawyers, and also definitions of contempt, and submit the same to the court for its consideration. In accordance with this suggestion the committee, which is composed of Paul Howland, Chairman, R. B. Newcomb and John T. Scott, submitted the following, dealing with the improper practices in question:

"1. The Canons of Professional Ethics, as now adopted by the American Bar Association and the Ohio State Bar Association, are hereby adopted as the standard of professional conduct for the legal profession of this state, and any violation thereof shall constitute cause for discipline.

"Without in anywise limiting or qualifying the foregoing standard of professional conduct, the following rules, dealing with particular situations, are hereby adopted:

"(A) No attorney shall, directly or indirectly, solicit any item of business; and no attorney shall, directly or indirectly, hire or employ, nor directly or indirectly pay money or other thing of value to any one for procuring or assisting in procuring or in recognition of procuring or assisting in pro-

curing any item of business, it being understood, however, that nothing herein contained shall prevent any attorney from dividing the fee paid in respect of any item of business with another attorney whom he has requested to assist him in the handling of such item of business: and any attorney violating this rule shall be subject to discipline.

"(B) No attorney shall institute or prosecute any action or undertake the collection of any claim under an agreement with his client for a contingent fee, unless the basis for the contingent fee be a fixed proportion of the net recovery after deducting all costs and expenses incident to the prosecution of the action or the collection of the claim; and any attorney violating this rule shall be subject to discipline.

"(C) In the event that any employment contract or any contract of release or any other contract is by a court of competent jurisdiction set aside on account of fraud, actual or constructive, or duress or because a contracting party thereto did not at the time of the making of the contract have mental capacity so to do, any and all attorneys who are parties to any such contract or who negotiated or assisted in negotiating such contract shall be deemed prima facie guilty of misconduct.

"(D) Any attorney who shall attempt, directly or indirectly, to interfere with the performance of any contract of employment between another attorney and a client, or who shall induce or attempt to induce such client to break or violate such contract, shall be guilty of unprofessional conduct and shall be subject to discipline."

The Supreme Court thereupon set May 1 as the date for a hearing on these proposed rules and of any others which might be submitted at the same time and place and invited all members of the Bench and Bar of the state who so desired to attend and participate in the discussion. On that date representatives of the Cleveland, Ohio State and Toledo Bar Associations appeared. Mr. Paul Howland spoke for the Cleveland Bar Association in support of the rules above set out. Mr. John A. Cline of the State Bar Committee submitted a number of proposed rules and briefly discussed them. Mr. George W. Ritter outlined the attitude of the Toledo Bar on the various proposals. The court took the subject under advisement.

No Delays in New York Court of Appeals

IN these days of generally congested court calendars and loud criticism of the delays of justice, it is encouraging to hear that for the past six years, the Court of Appeals of the State of New York has had its calendar cleared by the time of each December adjournment. This information appears in an article in the New York State Bar Association Bulletin, by the Hon. A. T. Clearwater, chairman of that association's committee to confer with the Court of Appeals. "In January, 1918," the article states, "there were 860 cases on the calendar ready for argument. At its adjournment on the fourteenth day of June, 1923, there were none, and in every succeeding year at its adjournment in December, there were none."

This record, we are told, is largely due to the great judicial and executive ability of Chief Justices Hiscock and Cardozo, "both of whom possess the rare ability gently and pleasantly to suppress pleonastic tautology in the presentation of uncontroverted questions of fact, and well settled principles of law. . . . Never is there haste or manifestation of impatience or irritation; every lawyer is listened to; every case is thoroughly examined; every conclusion cautiously reached; not only is the case at Bar fully considered, but the far reaching consequences of a decision is well contemplated." One reason for this efficiency, Mr. Clearwater implies, is the high salaries paid by the State of New York to members of its judiciary, in comparison with judicial salaries in other states.

The Motor Car as a Crime Factor

THE increased use of the motor car is given part of the blame for the increase in burglary and house and shop breaking in England, in an article in the London Law Times of April 13, 1929. Instances of these crimes increased by nearly 2,000 in 1927, and in only 38 per cent of the cases was the perpetrator either charged or detected. In view of the usual English police efficiency, this record is more disquieting to Englishmen than it would be to an American public. "It is probable," says the Law Times, "that in the increased use of motor vehicles is to be found some part of the explanation" for the increase in these felonies.

The motor car is also blamed in the same article for causing an increase in another type of offense. "Motoring offenses" increased in England by 20,000 during 1927, the total being 183,448 as against 163,301 in 1926 and 150,733 in 1925. Without accurate knowledge of the increase in motor licenses, it is difficult to determine whether motoring offenses are increasing faster than the number of cars or not, but the Law Times ventures the opinion that "the rate of increase in offenses would on investigation be found to be balanced, if not outweighed by the rate of increase in the cars on the road."

Installment plans for the payment of fines is another present day tendency noted by the London Law Times. The fact that over half a million persons were "mulcted in fines" in 1927, and that less than 3 per cent of those fined went to prison, is cited by the English journal as "ample justification for the practice of allowing time for payment." Such practice, it is said, increases respect for law by securing the real object of fining, namely, payment; avoids the unwarranted hardship and degradation of imprisonment for many petty offenders; and not only saves the cost of such imprisonment but brings in a small contribution towards the expense of coping with minor offenses.

Yale Study of Connecticut Courts

THAT the jury has practically ceased to be used in criminal cases in Connecticut, that divorce is granted in 98 cases out of a possible hundred, where no contest is offered, and in 3 cases out of 4 even where contested, and that 90 per cent of contract and foreclosure cases are settled without contest, are some of the interesting facts disclosed by the first report of an extensive study of court administration carried on by the Yale Law School for the past two years, says the New York Times of March 25, 1929. The study has been under the direction of Professor Charles E. Clark and an advisory committee consisting of Professors Walter F. Dodd, Leon Green and Dean Hutchins.

Tables compiled relating to the operation of the criminal law show the almost total eclipse in Connecticut of the jury system. Nearly all the cases are disposed of either upon pleas of guilty or upon nolles recommended by the prosecutor. Divorce litigation comprises more than one-fourth of the total business of the Superior Courts of Con-

necticut, the report adds. Although the courts have emphasized as a rule of law that it is the duty of the courts to protect the interests of the State by denying divorce unless the statutory grounds are clearly proved, divorces are nevertheless granted in an overwhelming percent of cases.

Another surprising fact revealed by the study is that liquor offenses do not comprise a very large proportion of the total. In New Haven, for example, during the years 1926-27, the cases involving liquor totalled 178 out of 1,266. In the Police Courts of Hartford, out of 13,384 criminal prosecutions brought in 1927, 5,046 were for violations of the automobile laws and 2,527 for drunkenness. There were 963 cases of breach of the peace, and 425 liquor law violations.

Professor Clark, commenting upon the report, said that the facts revealed in such a study "will not of themselves determine important questions of policy, but will only provide those charged with the responsibility of making such determination some background of information as to the possible results of their actions."

Futility of Petty Sentences

SENTENCING petty offenders to jail for from one to ten days is a "futile gesture," which serves merely to swell the number of jail inmates by 25 per cent or more, and to increase the expense of maintenance, according to Joseph Fullman Fishman, of the Department of Correction, of New York City, and formerly Inspector of Prisons for the United States Government. More than half of the persons sentenced for definite terms in the city of New York are given terms of ten days or less, says Mr. Fishman, writing in the April-May number of The Panel, monthly publication of the Association of Grand Jurors of New York County. These petty offenders are the traffic law violators, the "drunk and disorderly," the vagrants or "bums," and innumerable other minor offenders.

These offenders are not reformed or deterred by such jail sentences, says Mr. Fishman, and he cites statistics showing that out of 18,856 men sentenced to prison in New York City for these trifling periods, 1,871 were identified as having served five or more terms; 525 had served ten or more times; and so on up to 54 terms for one man, while of the women, two had served 62, one 64 and one 65 terms!

The practice is not only futile but unfair, Mr. Fishman points out, for in most of these petty offenses, there is an option of imprisonment or fine, and it is only those who do not possess the comparatively small sum of money needed to pay their fines who go to jail. Mr. Fishman would therefore abolish all sentences of less than ten days, and suggests the following substitute methods of handling these petty offenders:

(a) By reprimand from the bench. (b) By making the defendant report daily for a specified period to the officer in charge of the police station nearest his home, or the place of his arrest. (c) By fine, but only in those cases where the defendant has a steady source of income or sufficient on his person to pay it, the fine to be made payable in installments if necessary. (d) By sentencing the defendant, particularly the one who has a job during the day, to spend his nights from 7:30 P. M. to 6 A. M. for a period of at least thirty nights, in jail. This will save his job, take away his free time which every man prizes the most, save the City the cost of his maintenance, and render unnecessary his transportation in a prison van. This sentence can also be given those who, although able, deliberately refuse to pay their fine, and those who fail to report to the police station as instructed.

New York Bankruptcy Investigation

THE New York investigation of conditions in the bankruptcy practice, sponsored by the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association, got under way during the last days of April. Colonel William J. Donovan, former Assistant United States Attorney General, was selected as counsel for the three associations, to act in cooperation with Federal District Attorney Tuttle. The investigation is to be conducted before Federal Judge Thomas D. Thacher.

In announcing the selection of Mr. Donovan as counsel, President William Nelson Cromwell of the New York County Lawyers' Association, in a statement in the New York Times, said that the three organizations had noted with grave concern the exposure of abuses in practice under the bankruptcy law and some weeks ago each had appointed special committees with full power. These committees had themselves made a general survey of the subject and had been in constant contact and cooperation with the Federal officials. When Judge Thacher was designated by the Federal Court to make the investigation, in accordance with the recommendation of the grand jury, the three associations were invited to participate in the proceedings as friends of the court.

"As conditions developed," his statement continues, "it seemed to the associations to be imperative that the investigation should be extended to cover any other abuses in connection with the general administration of the bankruptcy law; and, also, that the investigation should be directed to securing adequate remedial measures to correct abuses. Our petition to this effect was promptly granted by Judge Thacher and his order also authorized the bar associations to conduct the investigation by their counsel in association with the United States Attorney under the authority and direction of the court, the United States Attorney cordially assenting.

"While aiding the court in dealing with offenders, it is also the design of the associations to conduct the inquiry in a judicial spirit leading to effective and constructive remedies. . . . Therefore we considered it of prime consequence to the ultimate result that our counsel be one of large experience and well-known ability. Our choice fell upon Colonel William J. Donovan of the bar of this State and recently Assistant Attorney General of the United States, and we are happy to announce that Colonel Donovan has accepted the invitation of the bar to act as its counsel as being a call to high professional and public duty and in that sense only. His appointment by us meets with the hearty approval of Judge Thacher and the United States Attorney."

A Harrowing Tale of Overcrowding and Competition

A PITEOUS and almost incredible result of the overcrowding in the profession, as well as of the competition of banks, trust companies and other large concerns, appears in a statement of the Committee on Professional Ethics of the New York County Lawyers Association (Question No. 273 and reply). To put it briefly, conditions are so bad that a number of lawyers are being practically forced into the banking business. "Prompted by a realization that overcrowding in the profession"—we are quoting now from the question submitted to the committee—"as well as the activities of trust, insurance and title companies, and the investment and commercial banking houses, have narrowed the field of endeavor for the younger attorney of average ability, several of my colleagues and myself have decided to enter the field of investment banking." The applicants for advice then outline the character of institution they propose to conduct and ask if there is any professional impropriety in their engaging in it. To which the committee replied:

"This Committee has already expressed the opinion in answering question 179 that a lawyer may without impropriety and while continuing to practice law, engage in business. It carefully guards this expression by referring to its answer to question 114 previously published and saying:

"'In that answer the Committee has expressed its opinion, to which it adheres, that there is not in this country any accepted standard of professional propriety which warrants condemnation of a lawyer for engaging in business, while in active practice; but that if he does so he must conduct his business with due observance of the standards of conduct required of him as a lawyer; that the business must not be inconsistent with his duties as a member of the legal profession; and that it is improper either to make the business a means for the solicitation of professional employment or to put the solicitation of business upon the ground that he is a lawyer.'

"In the opinion of the Committee there is nothing inherently unethical in a group of lawyers becoming actively interested in an organization, whether incorporated or not, the purpose of which is to render advice with respect to investments, provided such advice is not legal advice, and provided further that such business is kept entirely distinct and apart from the professional practice of the lawyers interested therein, and is not used as means for attracting legal business to such lawyers."

American Association of Legal Authors Elects

THE American Association of Legal Authors has adopted by-laws and elected officers, according to an exchange. The work of the association will be under the direction of the officers, directors, an advisory council, an executive committee and subcommittees.

The directorate and advisory council includes Dean Roscoe Pound, of Harvard Law School; Frederick E. Crane, judge of the New York Court of Appeals; Emory R. Buckner, former United States Attorney; Martin T. Manton, judge of the United States Circuit Court; Justice Joseph M. Proskauer, Appellate Division, Supreme Court; Frank L. Polk, former Corporation Counsel of New York; ex-Justice Alphonso T. Clearwater, of Kingston, ex-president New York State Bar Association; Adelbert P. Moot, of Buffalo, ex-president New York State Bar Association.

Also David S. Garland, former editor "American and English Encyclopedia of Law"; William Mack, editor of "Corpus Juris"; Professor Cunliffe, director School of Journalism, Columbia University; Archibald R. Watson, formerly Corporation Counsel of New York; Andrew J. Sheriff, of Chicago, chairman committee of American Bar Association on the Co-operation of the Press and the Bar: Walter C. Sheppard, chairman publicity committee, Association of the Bar of the City of New York; Charles Strauss, ex-president, New York County Lawyers' Association; Henry Wynans Jessup and others.

The following are the officers elected: President, Archibald R. Watson; vice-presidents, William Mack, Walter B. Kennedy, of Fordham University Law School, who has written extensively on the philosophy of the law, and David S. Garland; secretary, Samuel D. Smolleff; treasurer, Ralph Orville Willguss.

Wyoming Legislature Adopts Five Uniform Acts

THE Wyoming Legislature showed itself particularly friendly to proposals for uniform state laws at the recent session, according to the Wyoming State Tribune and Cheyenne State Leader of March 28. It reports that "of the six uniform acts introduced at the 20th legislative session, five were adopted and are now incorporated in the Wyoming statutes. Measures approved were the federal tax lien registration act, fiduciaries act, fraudulent conveyance act, illegitimacy act and veterans' guardianship act. The one bill which encountered serious opposition which resulted in its defeat was the uniform conditional sales act.

"Passage of the five measures this year brings the total number of uniform acts adopted by Wyoming to 14, their enactment stretching over a period since 1905. Those adopted previous to the 20th session included the negotiable instruments act in 1905, desertion and non-support bill in 1915, partnership act, sales act and warehouse receipts act, all in 1917. In 1921 the wills act, foreign probated, was adopted by Wyoming, while in 1923 the declaratory judgments act and in 1927 the arbitration act and foreign depositions act were enacted."

Zoning Laws Grow in Popularity

MORE than three-fifths of the urban population of the United States now live in municipalities having zoning ordinances, a survey recently completed by the Division of Building and Housing of the Department of Commerce reveals. There are 754 cities, towns and villages, with a total population of 37,000,000, that have the protection afforded by zoning regulations.

New York State leads the country in the number of zoned municipalities with 131, the survey shows. New Jersey ranks second with 84, and California third with 73. Then come Illinois with 71; Massachusetts, 62; Pennsylvania, 43; Ohio, 41; Michigan, 31; Wisconsin, 30; and Kansas, 23. In practically every state there are some municipalities which have adopted zoning laws.

Fifty-six of the 68 largest cities in the country (those having over 100,000 population) are zoned. The rest of the zoned municipalities are divided fairly evenly among all the population groups, there being approximately as many villages with

less than 1,000 population which are zoned as municipalities of any other size.

Zoning has made tremendous progress in the United States in the last twelve years. In 1916, there were 8 zoned cities. This number was augmented to 38 in 1920. In the next year this number was doubled, the total being 76. The year following, 1922, showed considerable activity in New Jersey, New York, Illinois and Massachusetts, the additions amounting to 101, which increased the total number of zoned municipalities to 177. During 1923, cities in California and Illinois were more active than in the preceding year, while cities in New York, New Jersey and Massachusetts were less active. But with other states zoning, many for the first time, the year netted 106 zoning ordinances, and brought the total to 283. In 1924, 76 municipalities adopted zoning ordinances; in 1925 there was increased activity in zoning legislation in the states of Connecticut, Indiana, Iowa and Pennsylvania, and ordinances were adopted by 109 municipalities. Ninety-six municipalities zoned in 1926; 107 in 1927, and 87 in 1928, bringing the total number of zoned municipalities to 754.

In addition to the 87 cities, towns and villages zoning during 1928, 101 other municipalities were reported to the Division of Building and Housing during the same year as having either adopted more comprehensive zoning ordinances or amended existing ordinances to make their zoning more effective.

The majority of the municipal zoning regulations are comprehensive in scope, the survey disclosed. Of the 754 ordinances in force, 475 regulate the use, height and area of buildings. Of the 279 other zoning ordinances, the most control the use to which buildings and premises could be put, although 45 of the number also control the area of buildings, and 10 others control the use and height of buildings.

County zoning also showed progress in 1928. Prince Georges and Montgomery counties, Maryland, put comprehensive zoning ordinances into effect in areas adjacent to the city of Washington, D. C., and Glynn county, Georgia, adopted such an ordinance applying to its entire area. Township zoning in Pennsylvania has shown progress, with a comprehensive zoning ordinance for Radnor township added last year.

"Reports received from all parts of the country indicate a continuing zoning activity in all states," the Division of Building and Housing states. Considerable activity was revealed by the survey in municipalities not yet zoned, and in returning the questionnaires sent out by the Division, many of the city officials asked for information on the subject.

These questionnaires were sent to all municipalities throughout the United States having authority to zone under state zoning enabling acts. The returns indicated that there have been few changes made in the zoning acts as originally passed. Most of the municipalities that had enacted zoning ordinances prior to 1928 reported that the early zoning ordinances were still in effect. A few cities stated that minor changes had been made, as for instance, the extending of the boundaries of the various districts, principally in regard to the use of districts, wherein the use of buildings and grounds was controlled. A few others reported having revised their zoning ordinances, as, for example, by enacting a comprehensive zoning ordinance regulating use, height and area of buildings, to take the place of an ordinance previously adopted which only controlled the use to which buildings could be put. Of the 101 municipalities which augmented or amended their prior zoning ordinances during 1928, 77 by such amendments adopted fully comprehensive zoning ordinances.

Juvenile Court Celebrates Thirtieth Birthday

THE thirtieth anniversary of the birth of the juvenile court in America occurred on April 21 of this year, we are reminded by Charles L. Chute, general secretary of the National Probation Association.

From the establishment of the first court of this kind in Cook County, Illinois, in 1899, the juvenile court movement has grown until today there are only two states without some law providing for a special court for children, says Mr. Chute. He adds, however, "The surveys made by the National Probation Association and the United States Children's Bureau prove that many of these laws are seriously inadequate and should be amended. In certain states the laws are limited to a few large cities or counties. In some the courts are not given full jurisdiction to deal with delinquent children, while in others no jurisdiction is granted to deal with adults responsible for the delinquency or neglect of children."

A revised standard Juvenile Court Law has been drafted by the National Probation Association, which would give exclusive jurisdiction over children up to eighteen years old to specially organized courts, and confer broad jurisdiction to deal directly with families and adults contributing to children's delinquency or responsible for their care. The rules of procedure in dealing with children therein are based on chancery and not criminal jurisdiction. Provisions for investigation and thoroughgoing probation supervision are also included.

Six minimum requirements for a successful juvenile court have been listed by the National Probation Association. They are: First, that the presiding judge should be one chosen for his special qualifications, including an understanding of social problems, particularly those involving children, and a knowledge of child psychology; second, there should be a sufficient number of probation officers, carefully selected from experienced social case workers "who have the tact, resourcefulness and sympathy necessary to handle children"; third, an efficient record system should be part of the equipment of the probation department; fourth, the probation office should not be in a gloomy, cramped basement, but in a pleasant room with an opportunity for private interviews; fifth, the court must have the services of a clinic, with trained physicians and psychologists able to give mental and physical examinations to children; and sixth, the detention home for children awaiting disposition or temporary care should be a part of the facilities of the well equipped juvenile court. The atmosphere of such a home should not be that of a jail, but rather that of a well equipped home, with facilities for medical care, school, and recreation.

AMERICAN LAW INSTITUTE HOLDS SEVENTH ANNUAL MEETING

President Wickersham Outlines Work of Institute Since Last Meeting and Calls Profession to an Even Larger and More Vital Task—Striking Evidences of Favor with Which Restatements Are Being Received by Bench and Bar—Proposed Code of Criminal Procedure Approaching Completion—First Tentative Draft on Property Presented—Chief Justice Taft Speaks of Need of Federal Workmen's Compensation Acts in Transportation Field—Details of Proceedings

THE Chief Justice of the Supreme Court of a Southern State was speaking to a group of friends in the lobby of a Washington hotel during the meeting of the American Law Institute. "By the way," he said, "where is Mr. So-and-so (the reporter for a certain subject being restated by the Institute)? I want to tell him that I am giving his tentative draft as authority in an opinion which will be handed down next Monday!"

This little actual occurrence furnishes a fitting introduction to the account of the Seventh Annual Meeting of the Institute, held at Washington, D. C., May 9, 10 and 11; for it illustrates concretely one of the most significant facts brought out at the meeting, and that is the reception that is being accorded the work of the Institute by the profession all over the country. To use a colloquial but expressive phrase, the Institute's work is "taking" and becoming part of the thought of Bench, Bar and law teachers generally.

Favorable Reception of Restatements

Of the reception being accorded the Restatements by the judges, Director Lewis' report furnishes striking testimony. He prints extracts from a number of letters received from prominent judges about the publication of the first official draft of contracts. "The letters of acknowledgment received from the judges," says the Director, "show a surprisingly large number who, speaking either for themselves or their courts, state in advance their intention to take the Restatement as authority. In many instances this is limited by the qualification that there be no controlling local authority to the contrary. In several instances the desirability of an accompanying annotation of local decisions is expressed."

This last phrase about the desirability of local annotations brings us to the concrete evidences of the interest of the Bar in the Restatement. These are to be found in Mr. Goodrich's account of the assistance being rendered by cooperating committees of the State and local Bar Associations and in his report of the progress of the work on State Annotations to various parts of the Restatement. The cooperating committees are not only sponsoring State annotation projects in their respective States but also lending assistance in many other ways. They have become, we are told, "one of the most valuable and indispensable factors in the success which the American Law Institute is achieving." As to the work on State annotations Mr. Goodrich says there can be no doubt that it is well under way. He gives a list of States in which parts of the Restatement have already been annotated or are in process of annotation, or in which plans for doing so are being considered and perfected.

As to the interest of the Teaching Branch of the Profession, its increasing use of the drafts in the schools and the invaluable assistance which it is rendering in the preparation of State annotations and in the publication of articles in the Law Reviews—to say nothing of the important part which law school teachers are taking in the actual work of the Institute—render the production of further evidence on this point unnecessary.

Meeting Sounds Note of Confidence

The Seventh Annual Meeting sounded a note of confidence, due not only to the evidence of the appreciation of Bench and Bar, but also to the general realization that much had actually been accomplished and that the speed of that accomplishment was being considerably accelerated. Six tentative drafts of the Restatement were presented for consideration, representing work in Agency, Business Associations, Conflict of Laws, Contracts, Property and Torts—in all, 375 sections filling 687 printed pages. There was also presented Tentative Draft No. 2 of the Code of Criminal Procedure, the text and comment of which filled a book of 318 pages. This last work came before the Institute with a striking testimonial to the popular and legislative interest in this particular undertaking. Director Lewis in his report called attention to the significant fact that State Crime Commissions and Bar Association committees are already making recommendations based on the tentative draft of the first Chapter of the Code, which was considered at the last Annual Meeting. In Iowa, for instance, the senate has actually passed a bill embodying a substantial portion of the Chapter on Indictment—this on recommendation of the committee of the Bar Association of that state—and in other states equally notable recognition has been given to the work of the Reporters and their Advisers on this subject.

Tentative Draft No. 1 of the Restatement of the Law of Property represented the first work on this branch of the law that has been submitted to the Institute as a whole. The new subject made its début most auspiciously in a booklet of 154 pages covering 109 sections. Prof. Harry A. Bigelow of the University of Chicago Law School acted as Reporter for the first part of this draft, which covered the definition of general legal terms, definition

of terms relating to the law of estates, and estates in fee simple, while Prof. Richard R. Powell of the Columbia University Law School acted as Reporter for the special topics of estates tail, estates in fee simple conditional, and related estates. At the opening of the discussion of this subject—as was the case with most of the other subjects—the Reporter had to defend and explain the terminology adopted for his particular branch. This Prof. Bigelow and his associate did very interestingly.

The customary method was followed in presenting the Restatement and Comment and the Code of Criminal Procedure—except that the large amount of material before the meeting made it necessary, in the interest of expedition, to read merely the title to the various sections instead of the whole section, as heretofore. Where comment or criticism was made on any section of the Restatement or Comment, the question was open to discussion from the floor and the members freely availed themselves of the privilege.

The meeting was called to order at 10 o'clock Thursday morning in the Grand Ball Room of the Mayflower Hotel, Washington, by President Wickersham. In his presidential address he summed up the work of the Institute's organization since the last meeting and paid a tribute to the late Floyd R. Mechem, former Reporter on Agency, whose death was a source of such genuine sorrow to his associates in the work. President Wickersham concluded his address with a larger view of the Institute's future tasks in the field of law improvement and with a clarion call to the profession to meet and discharge its responsibilities. The address is printed in full in this issue.

Chief Justice Taft's Address

At this point President Wickersham announced that the Chief Justice of the United States had honored the Institute with his presence. The Chief Justice was received with great applause as he ascended the platform and greeted the assembly. He spoke as follows:

"Gentlemen, I came here to get some information and I am delighted to have had the benefit of hearing Mr. Wickersham. I expected also to hear the more important details of your work from your Director, Mr. Lewis.

"I think you must have gotten used to this as part of your dose when you come down here. I have had the pleasure of addressing you two or three times, and I hope you will remember, or that you do not remember, what I said before, as I may say it again.

"The last words of Mr. Wickersham, of course, are echoed in the hearts of all of us—with reference to the necessity of changing the minds of the American people from little things to the largest thing that confronts us, the necessity of enforcing the law. I do not think it can be done all at once. There is one difficulty that confronts every person who is anxious to do good thinge, namely, that in the minds of the American people there is nothing important unless it can be had 'warm for breakfast' the next morning. That sort of thing certainly cannot be done in the matter of the progress of the law.

"I observed that Mr. Wickersham referred to our dear friend, Elihu Root, as having won, as he had before, the great respect of all who assembled to represent the Nations of the world at Geneva. He referred to his age, but that is a matter I am going to deem irrelevant (laughter). We, in our court, do not look upon age as a matter of great consideration. You refer to a young man like Mr. Root at eighty-four; we have better than that (Applause). The truth is that most of us regard seventy as the begining of middle age; and it is not really respectable to be very much younger than that. (Laughter).

"I can only report from our Court that we are still hopeful that the generous projects of Congress with reference to a proper home for the Court, may continue. We are just now going ahead and I hope that within the course of a week or two we shall have ready for submission to Congress the proposed plans and the models of the new Supreme Court building. (Applause.) We have an opportunity to show to anybody who desires, the enormous conveniences that we have for the meeting of our Court. A good many of you are familiar with the place where you can put your hats and coats with a good deal of danger to them—in the Clerk's Office. We are really shamefully lacking in the opportunity to greet the members of the bar when they come and honor the Court by their presence. We have secured and paid for the lot. It is on the lot that corresponds to the place where the Congressional Library is—to the left, or to the North. How long it will take to construct the building, we are unable to say, but we hope that we may get it done in three years.

"It must be a monumental building. It must be a building for the housing of very considerable libraries. It must be a building that has a good court room. It must be a building where members of the Bar can be comfortably placed. It must be a building where each member of the Court shall have a suite of apartments. And it must be a building of such dignity and such extent as to represent the Judicial Branch of the Government. And I am glad to say that our experience so far with the Committees is that they are all filled with enthusiasm—if I may say so—in regard to the construction of such a building.

"I can say with respect to the business of the Court that under the beneficent Act of February 13th, 1925, we have made such progress with business that I think members of the Bar are beginning to be a little embarrassed by the proximity of the Court to them. (Laughter.)

"I feel like saying one word about the enforcement of the law and the improvement of conditions with respect to the law. This Institute itself is a great evidence of the improvement that I feel sure we have a right to anticipate; but I am conscious through my own experience of the fact that a great many legislators are anxious to know what to do. Now I do not want to attribute their interest to anything selfish or political; but I think they have developed on the political side a consciousness that people at home are beginning to ask what they have done to help along. Until we get the legislators of the Nation thoroughly charged with the knowledge of their duty with respect to furnishing to lawyers and to judges the means of im-

Group on President's Stand at Opening Session of Seventh Annual Meeting of the American Law Institute. Reading from left to right: William Draper Lewis, Director; Chief Justice William Howard Taft; Hon. George W. Wickersham, President of Institute; Hon. James Byrne, Vice-President; Hon. Benjamin N. Cardozo; and George Welwood Murray, Treasurer.

provement, we shall not find that improvement. I am glad to think they are becoming charged in that respect.

"I hope you will pardon me if I mention one improvement that I have not heard dealt with here—doubtless it will be, although it will not come in the study or the Restatement of the law. A good many years ago it was attempted in Congress to provide a Workmen's Compensation Act, or what was equivalent to it, with reference to that great body of men whose lives are constantly at stake in the operation of the transportation systems of the country. We, in the Supreme Court, and all judges who have to do with the active conduct of litigation, realize the amount of time that is taken up in litigation of this kind, and also realize how much has been saved to the courts of the country by these Workmen's Compensation Acts.

"But we have no such system in the Federal courts, *and we need it!* and I hope that in the study of *negligence,* which I understand is going on, you may stop for a moment and look over to a kindred subject. If you will look back, as we can, to the years since those acts were initiated, and think how much time might have been saved and how much real good could have been done by introducing what is practically a system of general insurance to save life and limb and widows by means of assistance after the death of the bread-winner, I think you will feel stirred to a movement of that sort. It failed, I am sorry to say, because of the spirit that actuated some of the opponents, which has been re-stated with emphasis in the revelations that recently have been made in New York in what has been called the 'Ambulance-Chasing Investigation.'

"Now, far be it from me to say that the Federal Bar has any ambulance-chasers; but I think you might investigate, and if there are none, find it out. (Laughter.)

"I did not expect to say so much, and I have no right to interfere with a suggestion of this sort, and I am very sorry I did not have Mr. Lewis to help me suggest some other topics in addition to those which your genial President brought out with such force and eloquence.

"I thank you all very much." (Applause.)

Mr. George Welwood Murray presented his report as treasurer, which was approved, and then

followed the reports of Director William Draper Lewis and of Herbert F. Goodrich, Adviser on Public and Professional Relations.

Director Lewis' Report

Director Lewis' report begins with the statement that the best evidence of the work done on the Restatement since the annual meeting last year is the tentative drafts presented for consideration. The six drafts, covering 375 sections and 687 pages, represent work in Agency, Business Associations, Conflict of Laws, Contracts, Property and Torts. After paying a tribute to the late Floyd R. Mechem, Reporter on Agency from the organization of the work to his death, he stated that in Mr. Warren A. Seavey the Institute had secured as Reporter "the man whom Mr. Mechem wished to have succeed him in case he was unable to complete the task." The report continues:

"We have long outgrown the original concept of a Restatement of a Subject done by a Reporter with the help of criticisms and suggestions from a group of Advisers. The Final Preliminary Drafts submitted to the Council and, after amendment, submitted for your consideration as Tentative Drafts are group products. The Reporter is indeed the first member of the group; but often, in connection with a particular section, all the members of the group have forgotten the form in which it was presented by the Reporter in the first Preliminary Draft. Therefore, on Mr. Mechem's death the nearly completed work on the Chapter on the liability of the principal for the contracts of the agent could be finished by Mr. Seavey and the other members of the group without appreciable loss of time. Portions of this Chapter dealing with matters of very considerable difficulty have been before the Agency group for more than two years."

A method of better utilizing the personnel in the case of a subject which is too broad to be dealt with effectively by a singe Reporter is set forth in the following extract from the Report:

"This year the first Tentative Draft in Property is presented. Work on the Restatement of this Subject was begun and the group as now constituted was organized in January, 1927. It has been recognized from the first that the Subject was too large to be completed in any reasonable time unless the Reporter was relieved from the responsibility of preparing the Preliminary Drafts of some of the chapters. You will, therefore, find that the Draft now submitted is divided into two parts. The first part contains introductory matter and sections on Estates in Fee Simple. The second part contains the sections relating to creating conveyances in the Chapter on Estates Tail. Mr. Bigelow, the Reporter for Property, prepared and submitted to the Property group the successive Preliminary Drafts out of which has developed the first part of Tentative Draft No. 1, while Mr. Richard R. Powell has acted as Reporter for the matter treated in the second part.

"This assignment of one or more chapters to an Adviser to act as Reporter for the chapter would be impossible were it not for the fact that the Tentative Drafts submitted to you are, as I have just emphasized, always the result of group work. The same plan has been adopted in contracts, where Mr. Arthur L. Corbin is acting as Reporter for the Chapter on Remedies."

The Report next calls attention to an experiment undertaken last year in connection with the work on Trusts. "In my last Annual Report," says Director Lewis, "I dealt at some length with the work being done on Trusts, pointing out that we were trying the experiment of asking the Reporter, Mr. Austin W. Scott, to prepare a first Preliminary Draft of the entire Subject before submitting any part of it to his Advisers. Mr. Scott, after two years' work, finished this first Preliminary Draft last October. Since then there have been five conferences to consider the various redrafts of different portions of the first third of the Subject. At the present time part of this first third is ready for submission to the Council and next year a very considerable portion of the entire Subject will be before you for your consideration.

"It is too early yet to pass final judgment on the relative advantages and disadvantages of having the Reporter prepare a Draft of the entire Subject before submitting any portion to the Advisers. Of course, the plan in any event only can be applied to a subject like Trusts which has clearly defined boundaries. We have, however, gone far enough in the work on Trusts to know that the plan followed does not reduce the work required of the other members of the group or diminish the number of conferences. The preparation of an adequate Restatement of any Subject is a long and arduous task. There is no short cut."

The Report says this of the work on the Code of Criminal Procedure:

"The Draft relating to the Code of Criminal Procedure submitted at this time includes all matters pertaining to the trial of criminal causes from jurisdiction and venue to the challenge of trial jurors. This Draft and the Draft submitted last year together represent nearly three-fourths of the Code as planned. There is every reason to expect that the remaining portion containing the Chapters on the Conduct of the Trial, Verdict, Arrest of Judgment, New Trial, Judgment and Sentence, Execution and Appeal will be ready for your consideration at our next Annual Meeting.

"It is very gratifying to report that since our last Meeting several crime commissions and bar association committees have made recommendations based upon the draft of the first chapters of the Code considered at the Annual Meeting in 1928. Thus, for instance, a committee of the Iowa State Bar Association recommended the adoption of a substantial portion of the Chapter on Indictment and at the present writing the bill carrying out this recommendation has been passed by the State Senate. In Louisiana the commission appointed to frame a code of criminal procedure has recommended portions of the Chapter on Arrest and Indictment and a committee appointed by the Ohio State Bar Association to revise the criminal code of that state has recommended the enactment of portions of the Chapters on Arrest and Preliminary Examinations.

"At the time this Report is written the exact scope of the Law Enforcement Commission to be appointed by the President is not known, but should it, as indicated, include the simplification of criminal procedure, the work which the Institute

has done and is doing on this Model Code should be of great practical assistance."

The Report contains a number of letters from judges all over the country dealing with the first half of the Official Restatement of Contracts. They show that this first official final publication of the Institute has had a gratifying reception. "The letters of acknowledgment received from the judges," we are told, "show a surprisingly large number who, speaking either for themselves, or their courts, state in advance their intention to take the Restatement as authority. In many instances this is limited by the qualification that there be no controlling local authority to the contrary. In several instances, the desirability of an accompanying annotation of local decisions is expressed."

The importance of the work on State Annotations is next touched on, and the Report then concludes with the following estimate of "The Chief Accomplishment of the Institute:"

"The primary object of those of us who established this Institute was to secure an organization by which an orderly statement of our common law could be produced. The task is so great that it was essential to bring together for its accomplishment the leaders of the bench, the bar and the schools. The work has now gone forward for six years. In that time our idea of its importance has not grown less. If possible, the Restatement appears to us more important today than when the work was started, and this, perhaps, because success is coming more quickly than we expected. And yet, however important the Restatement of the Law may be, still more important is the fact that through the Institute and its work the legal profession has learned to organize itself for the constructive improvement of justice in this country. If some malign spirit were to wipe out today every trace of the Restatement, the enthusiasm and effective co-operation which we have inspired would make the work of the Institute worth many times the labor and money expended."

Mr. Goodrich's Report

Mr. Herbert F. Goodrich, Adviser on Professional and Public Relations, then presented his report. It told of the very great assistance that is being rendered by the cooperating committees appointed by various State and local Bar Associations. It then presented in interesting detail the progress of the cooperative work on the State Annotations of the Restatements. Reports from twenty states showed that this form of participating in the general work of the Institute had made a strong appeal and that much work had been done or was projected for the near future. The Report then proceeds to give the following conclusions as to the best method of proceeding with the State Annotation work,—conclusions which have grown out of the experience of the past few years:

"The ideal method of preparation of local annotations is a cooperative undertaking by local associations of lawyers and judges and the law school or law schools of the particular state.

"It is highly desirable that a project for such local annotation of the Restatements should be sponsored by a group representing the legal profession in the whole state. This may be the state bar association, or that association in combination with an association or conference of judges, or a combination of these two with various city or county bar associations. Organizations among lawyers vary somewhat in different states. The important thing in this connection is that the project should be participated in, so far as possible, by the entire legal profession in the particular state.

"The committee in general charge of the annotation work should be made up of the most distinguished lawyers and judges who can be induced to serve upon it. It is obvious that few men at the top of their profession, either on the bench or at the bar, can personally devote their time to the actual collecting and analyzing of decisions and statutes in the preparation of local annotations. But they can, and do, show great willingness to act on committees supervising such an undertaking, lend their names and authority to the enterprise, and give valuable help and suggestions to those engaged in actual preparation of the material.

"The law schools are manifesting great interest. They are giving their help in a very generous way to the actual labor of preparing the local annotations. The law teacher is fitted by training and experience to do this type of work to the best advantage. It is by no means "hack" work. It cannot be effectively done by clipping paragraphs from local digests and pasting them under various sections of a Restatement. A good local annotation involves careful reading and analysis of cases and a legal training broad enough to do something more than follow headings of a digest for the application of a principle. It requires a broad knowledge of the law, and a study of both local authorities and the Restatements. If it is to be well done, it is a task neither for immature law students nor digest makers. It is a very exacting type of scholarly performance.

"The object should be to attain, in the annotation work done in the various states, the same type of cooperative enterprise which is contributing so greatly to success in the restatement of the law. The Restatements are the result of cooperative work and study by judges, law teachers, and practicing lawyers. The same ideal should be sought for in the work in each state. The annotation should be the product of united effort from all branches of our profession.

"As a general project, it is not feasible to endeavor to publish in permanent form local annotations to tentative drafts. The work of the Restatement of the law in the various subjects is making such encouraging progress that it now seems unnecessary to endeavor to put out local editions of the tentative drafts. These tentative drafts will be subject to some revision before final publication. A locally annotated volume could not, therefore, be final. If the tentative drafts were to be used for any considerable length of time before revision, a local annotation might be desirable, despite the difficulty and expense involved. But it is now clear that this is not the case. Work on the tentative drafts in several subjects will soon be completed. Revision and presentation of the revised material for final approval will follow soon

thereafter. Part of our Restatement will be completed almost before we realize it.

"In view of these facts, the most desirable way of handling the local annotation work seems to be as follows: a state organization should be completed and the work upon the local material started as soon as possible. By the time that task is done the official drafts will be ready or almost ready. In the meantime, it is very desirable both from the point of view of the Institute and the local project that, wherever possible, portions of the tentative drafts with local annotations appear from time to time in local legal periodicals of the state. This keeps alive the interest in the work and affords those interested an opportunity to offer suggestions for the improvement of tentative drafts and local annotations thereto. This has already been done in Oregon, Pennsylvania, Mississippi, Kentucky, and Nebraska. More of such work is under way and will appear in the near future.

"The expense and labor of publication and distribution of local editions of the Restatements is something that the Bar Associations can hardly be expected to carry. Few Bar Associations have money enough to finance such a project. None is equipped with a sales organization or anything comparable to it. Some plan must be worked out so that the Restatement and its local annotations can be made available to lawyers at reasonable prices without compelling the various associations to go into the book publishing business. That such a means can be found I have no doubt."

The Adviser mentions with appreciation, at the close of his report, the recognition which the Institute and its work has received and continues to receive from Bar Asociations and legal periodicals.

Tentative Drafts Taken Up and Considered

Consideration of Tentative Draft No. 5 of Conflict of Laws was then taken up. It covered Judgments and Other Imposed Duties, Administration of Estates and Procedure. Prof. Joseph H. Beale of the Harvard Law School is Reporter for this subject. An interesting discussion took place on the common law rule that an action for trespass on land is "local" and cannot be brought except in the State where the land lies. All those present disapproved of the rule, but it was felt that the Restatement should give the existing law and not what members thought the law ought to be. So the wording of the proposition was left unchanged, but comment was added recommending a change in the rule to courts and legislatures.

Consideration of the subject of Business Associations, Tentative Draft No. 1, Sections 20 to 41, and Tentative Draft No. 2, was next taken up. Director William Draper Lewis is Reporter in this field, and is assisted by an able corps of Advisers. The discussion principally involved questions of terminology.

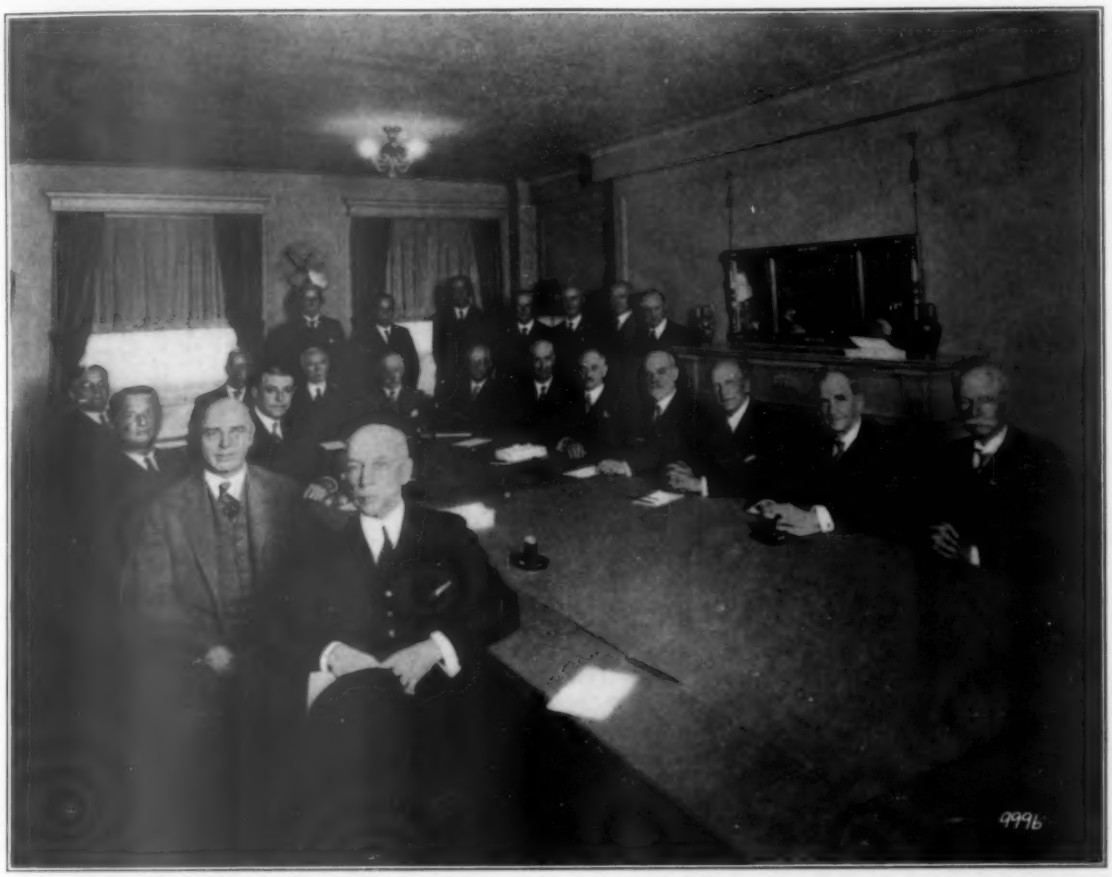
In the afternoon the Code of Criminal Procedure, Tentative Draft No. 2, was brought before the meeting. The Reporters, Dean William E. Mikell, of the University of Pennsylvania Law School, and Prof. Edwin R. Keedy of the same school, were present and answered all questions put from the floor.

The subjects covered were Process upon Indictment and Information, Arraignment, Motion to Quash and Pleas, Jurisdiction and Venue, Change of Judge and Removal of Cause, Waiver of Jury Trial, and Trial Jury. The draft excited much interest and the discussion was lively from the first. The statement in section 216 of the only grounds upon which a motion to quash an indictment or information would be available gave rise to several questions from members. Requiring the consent of both prosecuting attorney and the court to a plea of guilty of lesser offense or lesser degree (sec. 231) was explained as a means of inspiring greater public confidence. Further on, section 245—"Where act within State culminates in offense without State," gave rise to a quite extended discussion, but no change in the Reporters' statement was urged.

Code of Criminal Procedure Discussed

The sections dealing with "Change of Judge and Removal of Cause" received particularly careful consideration. Section 265 provided that "when an application is made to a judge for a change of judge he shall proceed no further in the cause, but another judge who is competent to act shall be substituted for him." Several members found it strange that the judges should be left no discretion in the matter, but Prof. Keedy pointed out that the section, in the opinion of the Reporters, represented the best way to meet a difficult situation. To make the judge the arbiter of his own qualification was not thought desirable. He pointed out that the application referred to in this section was not simply a formal matter, but was intended to be safeguarded by a previous section which required it to be in writing and presented in open court and to state the ground on which it is based; also to be verified by affidavit of the prosecuting attorney when made by the state and, when made by a defendant, to be verified by his affidavit and accompanied by a certificate of counsel of record that it was made in good faith. In the section on Waiver of Jury Trial it was suggested that the consent of the court as well as of the defendant and prosecuting attorney be required, and the Reporters took the suggestion for consideration.

Torts, Tentative Draft No. 4, was next taken up. Prof. Francis H. Bohlen, of the University of Pennsylvania Law School, is Reporter on this field, and Prof. Edward S. Thurston, of the Yale University School of Law, is Assistant Reporter. The subject covered in the draft was "Negligence—General Principles; and Liability for Condition and Use of Land." This very extensive contribution to the subject, as well as the previous drafts, represents, as Director Lewis says in his report, "pioneer" work in legal analysis. To a criticism from the floor that the comment seemed at times a trifle refined and difficult to understand, Prof. Bohlen replied that the member little realized the extent to which the Reporter had acted as a buffer to prevent the inclusion of much more subtle and even metaphysical concepts in the material. The subject is one in which the Bench and Bar are particularly interested as evidenced by the discussion. Section 235, "Liability for Harm Occurring Before Opportunity to Remedy Dangerous Condition" of prem-



Members of Council of American Law Institute. Reading from left to right, group standing at back: Judge George W. Wheeler of Conn., Hiram M. Garwood of Texas, Robert G. Dodge of Mass., Judge Frederick F. Faville of Iowa, Judge Rousseau A. Burch of Kansas, Daniel N. Kirby of Mo., Judge William I. Grubb of Alabama.—Seated at far end of table in light suit, President George W. Wickersham. On his left hand, seated, reading from left to right: William Draper Lewis, Director, Orrin K. McMurray of California, Henry Upson Sims of Alabama, Judge Emmett N. Parker of State of Washington, Thomas W. Shelton of Virginia, John G. Milburn of New York and George Welwood Murray, Treasurer, of New York. — Seated, President Wickersham's right hand, rear three, reading from right to left: James Byrne of New York, Judge Arthur P. Rugg of Mass., Judge Marvin B. Rosenberry of Wisconsin. In front of them, right to left, Owen J. Roberts of Penn. and Monte Lemann of Louisiana. In left foreground, right to left, Victor Morawetz and Judge Arthur J. Tuttle of Michigan. Several members were not present when picture was taken.

ises, as well as many others, aroused lively discussion.

The first tentative Draft of the Restatement of the Law of Property was then taken up and considered. Tentative Draft No. 4 of Agency came next. It covered "Liability of Principal upon Contracts: Definitions, Disclosed or Partially Disclosed Principal and Liability of an Undisclosed Principal." Prof. Warren A. Seavey, of the Harvard Law School, is the Reporter on this subject, work on which was well advanced during the period of Mr. Mechem's Reportership. Tentative Draft No. 6 of Contracts was last on the Institute's program for this meeting. It dealt with the topic, "Conditions; and Breach of Promise as an Excuse for Failure to Perform a Return Promise." As is well known Prof. Samuel Williston, of the Harvard Law School, is Reporter on the subject, and Mr. Arthur L. Corbin of the Yale University School of Law is acting as Reporter for the Chapter on Remedies. The above drafts were taken up in the usual method and duly considered.

Hon. Arthur J. Tuttle, judge of the U. S. District Court for the Eastern District of Michigan; Hon. Hiram M. Garwood of Texas, Hon. Rousseau A. Burch of Kansas, Daniel N. Kirby of Missouri; Thomas W. Shelton of Virginia, Owen J. Roberts of Pennsylvania, Elihu Root, Jr., of New York, Hon. Marvin B. Rosenberry of Wisconsin, Hon. Arthur P. Rugg of Massachusetts, and Mr. Monte Lemann of Louisiana, were elected to the Council on recommendation of the nominating committee. All of these were reelections except Judge Tuttle and Thomas W. Shelton, who replace Henry M. Bates and Andrew J. Montague, respectively.

The annual dinner of the Institute was held on Saturday evening, with Hon. George W. Wickersham, President of the Institute, presiding. The program included addresses by Hon. Newton D. Baker, former Secretary of War; Hon. Learned Hand, Judge of the United States Circuit Court, Second Circuit; and Hon. William D. Mitchell, Attorney General of the United States. It was a very successful affair, as was the reception given by President Wickersham to members and guests on the evening of May 8.

PRESIDENT WICKERSHAM'S ADDRESS

GENTLEMEN of the American Law Institute: At the last meeting of the Institute one year ago, we had to record the death of three members of our Council. This year we must note the first break in the ranks of our Reporters. Professor Floyd R. Mechem, Reporter for Agency, and unquestionably the best known figure in this branch of the law, died at his home in Chicago, on December 11, 1928. He was a distinguished teacher and writer, a man of simple, strong and lovable character, who was greatly esteemed by all who had the privilege of cooperating with him. The Institute has been fortunate in being able to secure Mr. Warren A. Seavey, Professor of the Law of Agency and Torts at the Harvard University Law School, who had collaborated with Professor Mechem, and was thoroughly *en rapport* with his work, to carry on to completion the Restatement of the Law of Agency.

Since the last annual meeting the Executive Committee has held four meetings, and the Council was in session December 19, 20, 21 and 22, 1928, and again March 6, 7 and 8, 1929.

As the work of the Institute has progressed, it has gathered force and efficiency, and this year there has been sent to the membership and will be presented for consideration at this meeting, a more substantial volume of work than ever before laid before the Institute at its annual meeting. Some appreciation of this may be derived from the brief statement that there is now submitted for your consideration a total of 1,083 printed pages. Included in this is the first installment of the Law of Property, embracing 109 sections, with explanatory notes; 56 sections of Contracts, with explanatory notes; 84 sections of Torts, with explanatory notes; 68 sections of Agency, with explanatory notes; 40 sections of Conflict of Laws, with explanatory notes, and 12 sections of the Law of Business Associations, with explanatory notes.

In addition you also have a very substantial installment of the Code of Criminal Procedure, covering subjects from Process Upon Indictment and Information down to and including Trial Jury. All of this, besides one other matter presently to be mentioned, will furnish you with sufficient material to occupy all the time at our disposal during the sessions of this meeting.

At its meeting on March 17, 1928, the Council considered Preliminary Draft No. 12 of the Code of Criminal Procedure, Chapter on Indictment, and voted to omit Section 196, which required the names of witnesses to be endorsed on the Indictment or Information. Subsequently, the Advisers in Criminal Procedure requested the Reporters to present to the Council a strong representation of the desirability of reinserting this section in the Chapter on Indictment, and after hearing the protest and reconsidering the matter, the Council, at its March, 1929, meeting voted that the section should be submitted to the members of the Institute at this annual meeting, with a note to the effect that the Council had not seen its way clear to recommend the action urged by the Reporters and their advisers, but in view of the opinion of the advisers the Council submitted the section to the Institute for criticism and suggestion. Accordingly, an opportunity will be given you for the consideration of this interesting subject.

During the year the first volume of the Restatement of the Law of Contracts, comprising 177 sections, which was considered at the last annual meeting and referred back to the Council with approval, was printed in a substantially permanent form, although when the entire work is completed, if any changes are found expedient to be made in this part by reason of comment and criticism after its publication, that may be done. The Council directed that free copies of this work, bound in buckram, be distributed to all the members of the Institute, the Judges of all the courts of last resort of the several States, and the Judges of the higher Federal courts, and also be sent to teachers on the Law of Contracts. The Executive Committee authorized the sale of copies bound in paper at $2.50 per copy, with a reduction to $1.75 per copy to law schools buying in lots of 25 or more, and with a discount of 20 per cent to commercial publishers, the selling prices of copies bound in buckram to be fifty cents more than the prices quoted for paper bound copies.

The book has met with a very gratifying reception by the bench and bar. The Director will report more in detail upon this point, but the attitude of the profession in general has been most encouraging.

The cost of printing the various Restatements and other documents required to be printed, has come to be a very serious figure, and the Council, upon the recommendation of the Executive Committeee, has directed that in publishing future volumes of annual proceedings, there shall be printed simply a synopsis of the minutes of the meetings of the Council and Executive Committee, and there shall also be omitted from the report of discussions over the drafts at annual meetings, all nonessential portions and also the speeches delivered at the annual dinners. I trust the excision of the latter will not rob the membership of important and cherished reading matter. The members of the Council in adopting this resolution felt that the greatest value of a speech was at the moment of its delivery, and that comparatively few people devote much time to reading printed addreses months after they have been uttered.

Under the By-Laws of the Institute, the term of office of one class of the Council expires at this meeting, and you will, therefore, be asked to ballot for eleven members of the Council to serve for the ensuing nine years. The members of the outgoing class are: Messrs. Alter, Bates, Burch, Garwood, Kirby, Montague, Roberts, Rosenberry, Rugg and Root Jr. (who was elected to fill the vacancy caused by the resignation of Harlan F. Stone). There is one vacancy in this class caused by the death of Professor Hall.

We have had during the year a number of inquiries from scholars in Canada and elsewhere, who were desirous of becoming members of the Institute. It was thought that, in view of the fact

(*Continued on page 376*)

DEPARTMENT OF CURRENT LEGISLATION

Criminal Legislation for 1928

By Joseph P. Chamberlain

THE review of criminal legislation for 1928 discloses a steady progress of the new conception of the importance of criminal records in the administration of justice, including records of the social history of criminals. It is also evident that the legislatures are persuaded that the use of presumptions as a means of facilitating convictions in criminal trials is valid. An important innovation in connection with a disputed matter is the Louisiana act establishing what one might call a special expert court to determine the fact of insanity. Whether this statute is valid under a constitution guaranteeing jury trial is at least doubtful, but the procedure itself is in line with modern criminal theory.[1] The object of the act is to avoid the conflict of opinion of distinguished alienists before a jury, and to compel those alienists to argue their findings before a board of technical men. It might be constitutionally possible to achieve this result by allowing this procedure in advance of the trial, submitting the opinion of the technical board to the jury, allowing cross-examination by counsel, and then permitting the jury to pass on the question of insanity, but prohibiting the introduction of other evidence on the sanity of the defendant.

Receiving Stolen Goods

The legislative campaign against the crime of larceny by attacking its economic foundation, the receiver of stolen goods, the fence, is developing on the front of evidence. It is very difficult to prove knowledge on the part of the purchaser that the property he acquired was stolen, but unless such knowledge can be proved, there is no crime. The person who is best informed in respect to guilty knowledge is the receiver himself, and so the legislatures have come to the aid of the district attorneys by establishing presumptions which allow conviction if the stolen goods are found in the possession of a person, and thus they turn the flank of the ancient rule against self-incrimination. Rhode Island, Ch. 1208, makes possession of stolen property evidence of guilty knowledge unless the possessor shows that it was acquired in the due course of trade and for an adequate consideration. New Jersey, Ch. 187, is more explicit. Possession is evidence of guilty knowledge, unless the defendant shows that the goods were a gift or purchased for a fair value or from one whom the buyer thought was a dealer, or unless the purchase was reported to the police. The last exception shows the possibility of another and immediate form of control of the market for stolen goods and the discouragement of theft, which is much used in regard to automobiles and jewelry.

New York, Ch. 354, has another way of dealing with the subject. The state legislatures had already adopted the principle that persons buying certain goods must make "diligent inquiry" that the person from whom the goods were acquired had a legal right to dispose of them, otherwise they will be presumed to have known they were stolen. The new law applies this rule to dealers or collectors of any merchandise or property, but as to such persons requires not "diligent" but "reasonable" inquiry. The old act made the purchase of the goods specified without "diligent inquiry" a crime, whereas the new act applying to dealers and collectors establishes the presumption that the property was received as stolen, so that as to them the failure to make inquiry is not in itself an offense, but merely establishes the presumption that the receiver of the goods had guilty knowledge. The act also punishes as a fence any person who conceals or withholds goods which he knows were stolen. The legislation has also abolished the judicial rule that a person selling stolen goods was an accomplice of the buyer, and therefore could not testify against him. Chapter 170 expressly reverses the courts on this point and permits the thief to testify against the fence.

Business Frauds

The legislatures appear to believe that the old rule of *caveat emptor* and the common law theory that a person must protect himself against being imposed upon in the purchase of goods, no longer applies in many modern conditions. One of the latest evidences of the tendency to set up a criminal penalty for the sharp practice of retailers is the statutes which are being so widely adopted, making it unlawful to deceive in the sale of liquid fuel or lubricating oil. Rhode Island, Ch. 1189, evidences this point of view. It is there made a crime to sell liquid fuel or lubricating oils in such a way as to deceive the customer as to nature, quality or identity. The tendency toward particularizing offenses appears in this act expressly making it a crime to sell from a container any other oil than that indicated by the trademark appearing on the container, and the wholesaler who assists the retailer to deceive the public by delivering oils to a retailer other than those indicated by the trademark is made a misdemeanant. South Carolina, No. 644, makes a step further by declaring it to be unlawful to fill an order by a trade name for a lubricating oil with a substitute article, or to sell oil not designated by trade name, without marking it "unbranded lubricating oil." Though openly a protection of the purchaser, it is quite possible that the great oil companies of the country indirectly protected by this legislation favor it. The evident similarity of laws in different states points to a common source outside of the legislatures.

New Jersey, Ch. 44, follows the same line in making it a misdemeanor to misrepresent food as

1. Glueck, Mental Disorder and the Criminal Law. Little, Brown, & Co., Boston, 1925. pp. 461 et seq.

kosher, and Ch. 133 lays down detailed rules for marking platinum and gold jewelry with quality marks and makes it a misdemeanor to fail to obey the statute. Rhode Island, Ch. 1199, has a wide implication. It protects the unwary reader of ads by penalizing advertising which falsely or fraudulently conveys or would reasonably convey the meaning that the subject of the advertisement is intrinsically worth more than, or was previously sold or offered for sale at, a price higher than the price quoted in said advertisement. The offense is called an offense against public policy. The punishment is a fine of $50 to $300 and/or not more than 90 days' imprisonment.

Motor Vehicles

The motor vehicle as an aid to crime appears in a new form in the statutes in South Carolina, No. 580, which declares it a misdemeanor to act as an advance, rear guard or pilot to a person engaged in transporting liquor, and authorizes the forfeiture of a vehicle used by such misdemeanant. Virginia, Ch. 131, found that its law prohibiting use on a motor vehicle of a smoke screen device to escape arrest, needed strengthening. The crime under the old law was a misdemeanor. It was raised to a felony, with a penalty of from 1 to 5 years in the penitentiary, or, as an alternative, $25 to $500 fine and confinement in jail from 30 days to 1 year, a wide choice for the judge. The act makes equally guilty anyone aiding or abetting the installation of this equipment, and also declares it a felony to possess a vehicle so equipped, if the possessor knew it. The new law contains another evidence of the activity of the police mind in Virginia. The former statute prohibited the use of the smoke screen for the purpose of escaping arrest or hindering an officer. The new law catches the prospective criminal before he has a chance to use the device for criminal purposes by making the crime simply the possession of the device.

The usual law penalizing possession of a motor vehicle with a mutilated factory or engine number is developed in Rhode Island, Ch. 1194, which directs a proper officer to take possession of such a vehicle and permits him also to arrest the operator and bring him before the court. The operator shall not be discharged till he has proved to the satisfaction of the court that he owns the motor vehicle and has a right to its custody, but he may be admitted to bail. Here in this roundabout way a presumption of theft is apparently established by the statute. New York, Ch. 373, makes larceny any unauthorized taking of an aircraft or automobile or other vehicle which is not larceny by some other law.

New Crimes and Modifications of Penalties

The campaign against ambulance chasing has brought fruit in New Jersey. Chapters 94 and 95 make disorderly conduct, and punishable accordingly, the soliciting of any person to bring an action for negligence. The Virginia legislature, in Ch. 213, makes an effort to cope with lynching. The statute recognizes the share in the crime of everyone in the "collection of people" assembled to commit an assault and battery, and makes "any act of violence" which results in the death of the person attacked, a lynching. Lynching is the putting to death of a person by a collection of people defined as a "mob," and every person composing the mob and every accessory thereto is guilty of murder, or if the mob merely commits assault and battery, then of a felony, subject to 1 to 10 years in jail. The legislature expressly enjoins the Commonwealth Attorneys to ferret out the identity of the members of the mob and authorizes the Governor to designate prosecutors to aid the Commonwealth Attorneys. This power is made real by giving him authority to spend such sum as he deems necessary to prosecute members of the mob. South Carolina, No. 656, declares it a felony for any person to assault, offer to assault, threaten, menace or intimidate while disguised by mask or otherwise. The punishment is from one to ten years.

Kentucky, Ch. 44, punishes blackmail by from 1 to 15 years, thus allowing the court to classify individuals according to the seriousness of the offense and the opinion in the particular county as to how harshly a particular individual should be treated. This broad power of appreciation given to the court is in contrast with the tendency often noticeable to reduce this power of appreciation by classification of degrees of crime. An instance is the law on arson passed this year, Kentucky, Ch. 40, and in Louisiana, Act. No. 211, but which are so similar to other acts passed in previous years that it would indicate a common origin in some interest affected. The former arson laws set minimum and maximum prison terms and thereby leave the seriousness of the punishment to the appreciation of the court, while the new acts, increasing the maximum to 20 years and the minimum to 2, in the case of Kentucky, instead of the old minimum of 5 years, classify carefully the buildings affected, so that there is not so wide an appreciation on the part of the judicial department. The maximum in the case of dwellings is 20 years and that in the case of burning other buildings 10 years; on personal property, 3 years, the minimum being 1 year. The new laws make it a crime to burn property to defraud an insurer, with a punishment of from 1 to 5 years, and punish an attempt to burn buildings or property with a penitentiary sentence of 1 to 2 years or a fine of $1,000. In other cases the alternative of fine is not provided. The placing of inflammable substances in a building or near other property with intent eventually to set fire to the building or the property is made an attempt to commit arson; it is not actually necessary that the fire be lighted. Kentucky, Ch. 41, amends the statute punishing uttering of worthless checks, makes a new class where the amount of the check does not exceed $20, which is punished by a fine of from $10 to $20 and imprisonment of not over 30 days or both, while if the check be over $20, the crime is still a felony. For a second uttering of a check of under $10 the defendant, however, must be sentenced for from 1 to 2 years. A serious increase in punishment is Kentucky, Ch. 42, which in the discretion of the jury makes the punishment for holding a person for ransom either life imprisonment or death. Formerly the punishment was imprisonment of from 2 to 21 years. An interesting case of adjustment of penalties is Virginia, Ch. 225, punishing forgery. The penalties of the old act, 2 to 10 years, are not changed, but an alternative is added permitting the jury or the court trying the case without a jury to confine the

committed person in jail for not less than 6 months or more than 12 months. The act also makes guilty of forgery any person who shall obtain, by false pretense or token, the signature of another person to a forged writing with intent to defraud. The Old Dominion, Ch. 408, used the alternative punishment device to ease the application of its decision to split the crime of making false statements to obtain credit, formerly a misdemeanor, into a felony when the value involved is $50 or over, but keeping it a misdemeanor for less than $50. For the felony the punishment is 1 to 5 years, or as alternative, a sentence to jail of not over 1 year or a fine of not over $500, or both. So the way is kept open to treat gently a person convicted of the felony, if the court thinks it just, but to punish severely a hardened offender or an individual generally objectionable to the community. South Carolina, No. 711, forbidding contracts for future delivery of certain commodities, notably cotton, or stock, when there is no bona fide intent to deliver them, and defining as bucket shops places where such contracts are made, makes it a felony to keep a bucket shop or to make such a contract. The act applies the principle of presumption by declaring it prima facie evidence that a contract was illegal if the persons involved refuse to give evidence concerning it.

Trial and Treatment of Offenders

The device of a wide spread between minimum and maximum punishment is one way of allowing the punishment to be fitted to the criminal as well as to the crime, the fitting being done by the court. The legislatures have been rapidly adopting the other method of special treatment for recidivists, so that whether the crime for which a person is convicted is very serious or not, has less influence on his punishment than the fact that he is a second or subsequent offender. Louisiana by Act 15, increases steadily the punishment on second or third convictions of felonies, finally on fourth conviction of a felony requiring the sentence to be imprisonment for life. As is usual in such statutes there are counted the convictions of felonies in Louisiana or convictions elsewhere for crimes which would be felonies in Louisiana.

The New York Legislature materially modified its suspended sentence act. The act formerly applied to first offenders, but now in any case the judge has discretion to suspend sentence and place the defendant on probation unless he has been convicted of a crime punishable by death or life imprisonment, is a fourth offender, or has been convicted of a felony committed while armed with a deadly weapon. The influence of the new notion of treating the criminal as an individual is evident in the provision for a report on his record and "social history" as a preliminary to the action of the court. The district attorney is also given an opportunity to be heard, and the responsibility of the judge pointed by requiring him to enter on the minutes the reasons for his action in respect to suspension of sentence. In every case the person under suspended sentence or on whom the sentence has been imposed but the execution of the judgment suspended, must be placed on probation. He will, therefore, be helped in going straight by the counsel of the probation officer, by the realization of the responsibility to report, and by the employment agency operated through the probation officer.

New York, Ch. 639, deals with the question of bail by prohibiting admission to bail in case of life imprisonment, or if the accused person is a fourth offender or has been convicted of a felony while armed with a deadly weapon. Under Ch. 374, wilfully jumping bail on a felony charge is a felony unless the accused person appears within 30 days. The legislatures appear to be closing in on the right to bail for dangerous offenders or persons who have committed serious crimes of violence. Louisiana regularizes the rights of arrested persons in Act 20. They may not be put in solitary confinement and their right to communicate with counsel and friends by telephone or otherwise is expressly declared. The legislature is not willing to depend on the sense of justice of its officers, but provides a criminal punishment by making any violation of the act a misdemeanor. Consequently a judge or magistrate who orders solitary confinement may feel the rigors of the law.

New York state has modified its legislation in respect to parole and probation. Probation, Ch. 460, is a function of the courts which are authorized to appoint and remove probation officers, who are protected by the Civil Service. The value of the volunteer officer is recognized in that the court is given the power to appoint "non-salaried volunteer probation officers when necessary, provided they have the qualifications required by salaried officers." The stress laid on social history, physical, mental and psychiatric examinations of the defendant is impressive, as proving the individualization of the criminal as a member of society, and recognition that he is not solely to be treated as a person convicted of crime. The court is given full power to determine conditions of probation, but the legislature suggests that it shall consider for including among the conditions faithful work, abstaining from the use of intoxicating beverages, support of dependents, or if a child of school age, attendance at school. The duty of the probation officer to keep the person under probation going straight is insisted on. Parole applied to convicts in the prisons, Ch. 485, makes very profound changes in the administration and application of the parole law. The newly appointed State Board of Parole is given control over the system, both administratively and semi-judicially. The full responsibility for parole is placed upon the Board. Parole is granted not on application made by the prisoner, but on the initiative of the Board which, at least a month prior to the expiration of the minimum term of each eligible prisoner, must have brought before it all the information with regard to him, and prison reports which must contain a report from the warden as to his attitude toward society, and how the prisoner regards the crime for which he is in prison. The physical, mental and psychiatric examinations must, as far as practicable, have been made within two months of his eligibility for parole, and they must be before the Board. There must in addition be a report of one of the members giving his personal views and recommendations. The prisoner himself must appear. With the evidence before it, the board must "reach its own conclusions" as to the parole and must decide by unanimous vote.

It is clear that the interest of the prisoner alone is not to be the deciding element. He may only

be released if "his release is not incompatible with the welfare of society," and only if "the Board is satisfied that he will be suitably employed in self-sustaining employment if so released." It is expressly provided that "no prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties." Formerly parole was too often a means of sanctioning prison discipline by providing the means of rewarding good conduct in prison with little regard for the probability of good conduct outside the prison walls. The statute precisely designates the records to be kept, notably requiring social, physical, mental and psychiatric condition and history of the prisoner. These records must be kept in the Central Bureau of Criminal Identification. Not only does the Board act as a quasi-court in deciding to parole prisoners, it also considers cases of parole violators whom it may require to serve out the balance of their maximum terms or "impose such punishment as it deems proper." Discharges from parole are abolished and if a prisoner be convicted of a felony while on parole he shall never be eligible for further parole.

Louisiana aligns herself, by Act 99, with the states creating a modern system of criminal identification. A State Bureau of Criminal Identification and Investigation is created under a board of managers of three: the Governor; one member, a chief of police of an incorporated city; and one the elected sheriff of a parish; both selected by the Governor. The Governor appoints the superintendent with the approval of the other members. The superintendent in his turn, with the approval of the board, makes rules and appoints his assistant, and on his own authority names the other five members of his Bureau. Law enforcement officers are required to make fingerprints of persons arrested who on the best judgment of the arresting officer are wanted for felony or who at the time of arrest have in their possession stolen goods or articles used in committing crimes. Fingerprints must also be taken of persons "reasonably believed guilty" of certain other crimes. Statistics of the disposition of criminal cases must be filed with the Bureau, and also records of all goods pawned or given second-hand dealers for sale. An interesting clause authorizes the Bureau to provide police schools. New York, Ch. 875, reenacts its statute setting up a Central Bureau of Criminal Identification, extending the records to include in addition to fingerprints, "information with reference to criminals and their records and methods of work." The new Bureau is to act in cooperation with the Bureau of Criminal Identification in the Department of Justice at Washington. Another important duty is the keeping of criminal statistics showing the number and nature of crimes reported or known to the police. Arrested persons granted or denied bail are tried by the criminal courts, and the action taken with relation thereto. The Chief of the Division of Criminal Identification is instructed to constantly study facts about crime and make special reports on crime conditions.

A very desirable tendency to improve the administration of criminal law by reducing difficulties inherent in the federal state system is in Louisiana, Act 71. Where a judge of a court of record of a state bordering on Louisiana, which by its law has made provision for commanding persons within its borders to testify in criminal actions in Louisiana, certifies that a witness is in Louisiana who is necessary in a felony case in such state, the judge of a court of record in Louisiana shall order such witness to appear and be heard in opposition, and may order him to appear in the other state to testify. If he fails to attend, he is punishable like any other person disobeying a subpoena. The act is to apply only if the laws of the state in which the trial is to be held give to persons coming into the state under such subpoena, protection from service of papers and arrest. South Carolina, No. 593, is another way of helping the state by giving it an increased number of challenges in proportion to those of the defendant.

Louisiana, by Act 17, provides a new method of settling a puzzling question of insanity of a defendant. The superintendents of hospitals of the insane and feeble-minded are created a commission of lunacy with permission to either superintendent to designate a competent physician to act in his place. A prisoner is held for not over 40 days in the Criminal Department of the Insane at the capital of the state, and his sanity is there investigated by the commission who must make their report in writing to the judge. If the report be that the accused is insane or was insane at the time of the commission of the crime, he is committed to an asylum to remain till discharged, but if the report be that he is sane and was sane at the time of the commission of the crime, the finding of sanity shall be final, and upon his trial insanity shall not thereafter be urged as defense. Any person found to have been insane at the time of the commission of the act, but presently sane is entitled to discharge by the court on the filing of the report. It will be interesting to see whether the Louisiana courts sustain this act as in harmony with Art. I, §9 of the Constitution requiring a jury trial in cases where the punishment is hard labor or death, and in other cases permitting trial by a court without a jury. Act No. 2 is a new Code of Criminal Procedure for the State of Louisiana. It organizes the many sections of the statutes relating to criminal procedure and contains in particular interesting codification of the law of criminal evidence.

Belief in Odoriferous Remedies

"In a recent number, the AMERICAN BAR ASSOCIATION JOURNAL wandered into the field of preventive medicine. The effort took the form of an explanation of an old custom in an English court. In this court a large bouquet of flowers always sits on the bench between the Judge and the prisoner and witnesses. This custom is a general survival of an old notion that the prisoner at the bar was liable to infect the Judge with jail fever. The flowers were placed before the Judge to screen him from the dangerous emanation from the prisoner. . . .

"There are still people who have faith in odoriferous appliances as measures for warding off disease. The courts are lucky that their observance to the fetish takes the form of sweet-smelling flowers. Most of the fetiches used are offensive to smell, at least. The bag worn around the neck is apt to contain asafetida. Sometimes other stinking drugs are added. The mixture exposed in rooms generally contain onion or something that smells even worse. None are of any service."—Dr. W. A. Evans in *Chicago Tribune*.

CHICAGO ASSOCIATION TAKES UNUSUAL STEP

Special Committee of Chicago Bar Association Investigates Sanitary District Legal Payroll and Exposes Gross Imposition on Public—Open and Secret Records of Employment—Many Lawyers Drawing Salaries and Doing Little Work—Legislators Employed—Committee Recommends Suits to Recover

A BOLD and unusual step in bar activities has been taken by the Chicago Bar Association in investigating the extent of the participation of lawyers employed by the Sanitary District of Chicago, in scandalous conditions recently exposed. The Sanitary District, a highly important political organization, controlling over two billion dollars worth of property and serving three and one-half million people in Chicago and 49 other cities and villages, was found to have on the pay roll of its Law Department 155 lawyers, more than a 100 of whom were drawing good salaries but doing little or no work, the Chicago Bar Association reveals in a report submitted by a committee on Public Law Offices.

The report, approved by the Board of Governors of the Chicago Bar Association, is the result of a comprehensive survey, in the course of which important documents, pay rolls, bill, and files of the Sanitary District were procured and examined, questionnaires sent out, and 141 persons who had been employed in the Law Department of the District during the past four years were interrogated as to the nature of their employment and the compensation paid them.

The committee is still engaged in the investigation of the conduct of individual lawyers and their responsibility for or participation in the abuses found to exist. No names are mentioned in the present report, which is confined to general findings, and recommendations for improvement.

Of the various kinds of law work of the District during the three years under investigation, the most important, says the report, was that connected with the Lake Levels controversy. This work was done largely by special counsel. There were ten of these counsel, and according to figures available these ten "received or charged for legal fees and their incidental expenses an aggregate of $499,130."

High as this sum may seem, the committee is willing to accept this disbursement without criticism, saying:

> "The number of special counsel employed in this controversy and the total amount paid to them seem large, and your Committee is disposed to believe that the work might have been performed as well by a smaller number of special counsel and at a less total cost. Still, in view of the importance of the controversy, the wide range of necessary investigation and study, the conflicts between National and state governments and between different States, the length of time the controversy has been in its acute and active stages, the great number of legal questions involved, and the amount of work performed, your Committee is unable to say that the number of special counsel employed in this work or the aggregate amount paid was excessive."

The second class of cases, involving the defense of suits brought against the District by residents of the Illinois River valley for damage to land and crops from overflow of the river banks, the report states, involved instances where Chicago lawyers were put on the payrolls without valid reason, and only, as the committee believes, "as a pretext for loading the payrolls."

Not only lawyers, but members of the legislature were found to be on the pay rolls of the Sanitary District, several of them Cook County lawyers. "What legitimate object the District had in employing members of the State legislature," says the report, "it is difficult to determine," and continues:

> "The intimation has been made that it was necessary to carry a number of legislators on the payrolls in order to secure proper protection for the District's interests at Springfield. Such a purpose was manifestly improper. One of the former Attorneys for the District stated before the Committee that during his administration of the office for a number of years no members of the State legislature had been employed, except in a few instances where downstate lawyers of prominence had been retained to represent the District in connection with the flood damage claims and happened at the same time to be members of the House or Senate. This former Attorney stated that during his administration, although no Cook County members were on the District payroll, the District had no trouble with the legislature.
>
> "Members of the Senate and House who appeared before the Committee denied that any action taken by them as legislators was influenced in any way by the fact that they were, or had been, on such payrolls. They admitted, however, that it was objectionable for any municipal body, such as the Sanitary District, whose interests are frequently affected by legislation pending at Springfield, to have a number of legislators on its payrolls. The employment by the Sanitary District of members of the legislature before which a program of proposed legislation for the relief of the District is pending, is a practice which is bound to destroy the independence and usefulness of the legislative branch of the government.
>
> "Some of the members of the legislature apparently felt that it was unlawful for them to be on the payrolls during the *sessions* of the legislature and had their names removed from such payrolls during their active service at Springfield. They were, however, on the payrolls during their terms of office as members of the legislature, and the Committee is at a loss to see that any real distinction could be based on the fact that the legislature was not actually in session at the time that they were on the payroll."

The usual salary paid by the District to Cook County legislators was at the rate of $416.66 per month. The legal services performed by them, says the report, "were for the most part not of a substantial character and did not, in the opinion of the Committee, justify the amount of compensation received by them."

As eloquent testimony of the extent to which the District payrolls were padded, the committee cites statistics of the persons employed in the Law

Department of the District during the past five years. The table:

Year	Lawyers	Non-lawyers	Total
1925	54	170	224
1926	68	162	230
1927	96	265	361
1928	155	409	564

After a drastic pruning, following the exposures which developed after the election of last November, the payroll now includes only 22 lawyers and 23 non-lawyers, a total of 45. The difference between this number and the figures for prior years (564 in 1928, and mounting annually) represents political patronage.

The methods of bookkeeping, by which at least two different pay rolls were used, are also exposed in the report of the Bar committee. It seems the District kept not only a "regular" payroll, but also a "miscellaneous" payroll, the latter containing the names of lawyers not provided for in the annual budget, but who received their compensation from other accounts. "Apparently," says the report, "no distinction between the kind or quality of work assigned to the different lawyers was based upon the fact that some were on the regular payroll, some on the miscellaneous payroll and some on still other payrolls. Although most, if not all, of the miscellaneous payroll was charged up to the Lake Levels account on the books of the District, only a very few of the lawyers appearing on that payroll were actually engaged in that litigation. This was one of the misleading methods of bookkeeping pursued by the District."

Particularly significant appears the fact that the miscellaneous payroll was carefully concealed, although the regular payroll was published in full, every two weeks, with the names of the attorneys appearing thereon and the amounts paid them. "So effective was this concealment," says the report, "that according to the statement of one active member of the Board it was several months after he took office before he learned of the existence of the 'miscellaneous' payroll or learned that the District had in its employ such an excessive number of lawyers." The report continues:

"In the opinion of the Committee this omission from the published proceedings of all mention of the miscellaneous payroll is convincing evidence of a consciousness of guilt on the part of Trustees and others who participated in such concealment and indicates that they well knew that this miscellaneous payroll was being used for a wrongful diversion of funds from the treasury of the District."

The method of selecting lawyers to work for the District revealed by the report seems flagrantly slip-shod and inefficient:

"In some instances men having absolutely no experience at the Bar and having been admitted to practice for only a few months, were placed on the payroll at salaries ranging from $4,000 to $6,000 per year, while other lawyers of much greater experience and presumably of better qualifications were paid from $3,000 to $4,000.

"During the period under investigation the lawyers who occupied the position of Attorney for the District and head of the Law Department were not consulted about and had nothing to do with the determination of the number of assistant attorneys to be employed, the selection of the particular persons, or the fixing of their rate of compensation, and frequently knew nothing about such assistant attorneys."

Any person whom the Chairman of the Employment Committee named, the report shows, was automatically put on the payroll by the Attorney for the District at the compensation specified by the Chairman, "without regard to any need of the District for such additional attorney and without regard to his qualifications, or lack of qualifications."

Most of the lawyers who appeared before the Committee sought to make some showing of services rendered, but, says the report, "in a large number of cases, such service was pitifully slight as contrasted with the amount of compensation received." A number of these lawyers, receiving salaries ranging from $3,000 to more than $9,000 per year, admitted that they had performed no service whatever for the District, but stated that they "had been ready and willing and expected to render legal services." A note of cynicism creeps into the committee's report in connection with these legal services:

"Only a comparatively small number of these lawyers had regular office space with the Sanitary District, but a large number of them claimed to have gone to the offices of the District several times a week either for the performance of service or in search of some assignment. Indeed, many of them told of persistent and fruitless requests made by them for work at the offices of the District. From the number who stated that they had made such visits, it would appear that the offices of the District must have been filled to overflowing well-nigh every morning by assistant attorneys. One of these lawyers, when pressed on examination as to what actual work he performed, stated that he sometimes showed callers into the office of one of his chief assistants, and again, that he sometimes got books down from the upper shelves in the library for other assistant attorneys who were looking up the law. This particular lawyer, whose services included such office boy work, was paid a salary of $4,800 per year."

"An equitable assignment" was made of all the work of the Law Department, by which was meant such an assignment of the work as to give each attorney something to do, so as to give him the opportunity of earning his salary. Laudable as this may seem, the report reveals that as practiced, the plan was inefficient to the point of absurdity:

"Such assignment was made without regard to the needs of the District, and in no way depended on whether or not the regular law staff could have performed the particular service involved. In making this 'equitable assignment' of work, the same cases were often assigned to several lawyers for a mere checking up of court dockets or other clerical work and the different lawyers were often ignorant of the fact that they were engaged in such absurd duplication of work. They must have realized, however, that they were not earning the liberal semi-monthly payments which they received. Rarely, if ever, was there any check to determine whether the lawyers to whom these assignments were made had performed the work so assigned. The First Assistant Attorney who professed to have made these assignments was unable to advise the Committee as to what, if any, matters had been assigned to a large number of lawyers on the payroll, and where he did attempt to specify, he was frequently contradicted by the lawyers who subsequently appeared before the Committee and stated that their work was of a different character. Indeed, a large number of the lawyers who had been in the employ of the District for periods varying from one to three years made so little impression during their employment by the District that they were in no way remembered either by the Attorney for the District, the First Assistant Attorney, or other assistant attorneys who were constant in their attendance at the office of the District. This complete oblivion which had overtaken both the personality and the professed services of numerous lawyers is persuasive evidence to the Committee that any work performed by them must have been negligible."

Among other legal labors, it seems a number of the lawyers were employed in the "Educational Department." Their duty was to familiarize themselves with the various activities of the District, and then lecture to clubs and civic organizations on the importance of the District's accomplishments and future plans. "It is to be noted," points out the committee's report, "that the 'Educational Department' was organized a few months before the fall election, and was active during that period.

How far it served any legitimate purpose, and how far it was merely a device to advance the political fortunes of the Trustees who were running for re-election, may be open to question."

In a number of instances, the report shows, the lawyer whose name appeared on the payroll did not receive the checks made out in his name. Cases are given in which checks totaling as much as $1,800 were made out to one lawyer, and returned cancelled, although the lawyer never received the money. The implication of the report is that political grafters forged the indorsements and received the money.

The committee's conclusions upon conditions found to exist in the Law Department of the Sanitary District are stated as follows:

"It was stated frankly enough before the Committee that the Sanitary District has for years been a political dumping ground, and that numerous employees of the Law, as well as other Departments, have been given jobs, not because of any need for them, but because of a desire to give them a reward for some political service, or as a favor to some political boss, big or little, who sponsored their appointment. The line of communication between the political bosses of different parties and different factions and the treasury of the Sanitary District was only too evident. Nearly all of the lawyers who appeared before the Committee stated that they got their appointments through the influence and nomination of some ward committeeman or other politician.

"Political debauchery in the Sanitary District has of late gone to unprecedented lengths. The spoils system thus built up has caught in its meshes lawyers who, in the first instance, may have been innocent of any intentional wrongdoing. Some sought and obtained jobs, perhaps in good faith, expecting to render service, but failed to resign when month after month they found no work of any consequence assigned to them. They continued to draw their semi-monthly paychecks when they must have known that these checks were absurdly out of proportion to any work performed. In many instances the recipients must have suspected from the first that there was something irregular about their employment. Many of them had previously given all, or practically all, of their time and their best efforts to the work of other public offices for a much smaller salary than they were receiving at the Sanitary District for only 'part time'—and often a very *small* part at that,—and they must have realized that they were being paid for something other than for an honest day's work. The only discussion that some of these men had concerning the salaries they were to receive was with the ward committeeman who announced that he had a job at the Sanitary District paying so many dollars per year which he could bestow on some ward worker. Men who had never before earned more than $2,000 or $3,000 per year for full time service were given salaries of $4,000 to $6,000 for part time without any discussion on their part; and sometimes they were subsequently given an increase of a thousand dollars or more per year without any knowledge on their part of the proposed increase or the reasons that prompted it. And such increases were given to lawyers who had apparently performed little or no service for their already excessive pay.

"Information furnished the Committee disclosed the closest kind of a working alliance between the bosses of the different political parties and factions. Democratic bosses procured from Republican trustees numerous jobs for Democratic workers, and Republican bosses obtained political jobs for Republican workers from Democratic trustees. Apparently no thought was given to the public interest, no attempt was made to protect the public treasury, in this wild scramble for spoils. It is a striking example of the evils of political manipulation of public office for personal ends, and well illustrates the betrayal of public trust which invariably occurs when the people elect spoilsmen to office."

The recommendations of the committee include the divorcing of the Law Department of the Sanitary District from "the pernicious political influences that have dominated it in the past," and adoption of a civil service system. Pending the passage of a proper civil service law, the committee recommends that the Trustees of the District amend their rules so as to give the Attorney for the District control of the Law Department, and power to approve the selection and rate of compensation to assistant attorneys, and to discharge those found incompetent or unnecessary.

The committee further recommends that the Law Department should consist of such a number of duly qualified lawyers as may be necessary, giving all their time to the District, except for a few special and local counsel, required for exceptional matters.

Full periodical reports of the work of the Law Department, and a regular quarterly publication of the pay rolls in the newspapers, is also recommended.

The practice of employing legislators should be discontinued, the report urges, and such employment should be prohibited by the legislature, by an act similar to that passed by Congress.

Suits should be started, says the committee, against the Trustees for their misuse of public funds, and against the lawyers who knowingly participated therein or benefited thereby. The chief responsibility for the "disgraceful conditions" found to exist is laid to the Trustees and their political associates, "who have debauched the public service and placed upon the payrolls of the District more than a hundred lawyers for whom there was no legitimate need." These Trustees "should be held responsible in the courts for the violation of their trust in knowingly and deliberately squandering them."

Of the lawyers who knowingly accepted the benefits of this unlawful misuse of public funds, the report says this:

"Of all classes of our citizens the lawyer should be the first to recognize the importance to the people and to the welfare of our government of the strict observance by public officials of their duty to protect the public funds from any diversion to private or other wrongful uses. The responsibility imposed upon the lawyer by his profession and by his oath requires his active support and encouragement of public officials in the honest performance of their duty. His aid or connivance in, and particularly his acceptance of benefits resulting from, a violation by public officials of their duty to the public is a greater offense than when committed by laymen, and he should be held to a stricter accountability.

The report concludes with the statement that the committee submits these general findings and recommendations to inform the Board of Governors of the Chicago Bar Association of the conclusions reached, but that the committee is "reserving until the completion of the investigation our recommendations for disciplinary action against such members of the Chicago Bar as shall then appear to us to have been guilty of unprofessional conduct in connection with their employment by the Sanitary District."

The committee which is making this searching investigation is headed by Edgar B. Tolman, chairman, with Lessing Rosenthal, vice-chairman. The other members are: Walter Bachrach, Richard Bentley, Stephen A. Foster, Irwin T. Gilruth, Bruce Johnstone, M. V. Kannally, Harry Eugene Kelly, Thomas J. Lawless, George H. Meyer, Erwin W. Roemer, Frederick E. Von Ammon, Russell Whitman, James H. Winston, and Hobart P. Young. John M. Cameron was also a member of the committee, and took part in the hearings, but did not participate in the report because of his absence abroad.

STANDARDS FOR ADMISSION TO BAR CONTINUE TO GROW STRICTER

Recent Changes Show Tendency to Require Better General Education Before Beginning Law Study—Required Period of Law School Study Also Increasing—Office Study Is Discouraged in Most States but Required in Pennsylvania

CHANGES in the requirements for admission to the bar made by various states during 1928, with one possible exception, all show a tendency to raise both the general educational requirements and the period of law school study, the Annual Review of Legal Education issued by the Carnegie Foundation for the Advancement of Teaching reveals.

Pennsylvania, which has long differed from other states in requiring applicants who are not college graduates to pass an examination roughly equivalent to a high school education in scope, instead of accepting certificates issued by the high schools themselves, has transferred the conduct of this examination to an independent body of experts, the College Entrance Board, by a Court Rule adopted September 30, 1927. The first test of the new rule came in June, 1928, and resulted in so few of the applicants' passing that between 98 and 99 percent of those registered as beginning their law studies in the latter half of 1928 were graduates of a college. "We thus have the curious outcome," states the Foundation's Annual Review, "that, although the Pennsylvania Supreme Court has expressly repudiated the American Bar Association requirement of two years of college work as tending to close the door of the profession against self-educated men, yet that Court today maintains a standard of general education which in its practical application is far more rigorous than that of any other jurisdiction."

In New York, the Court of Appeals determines the rules for admission to the Bar. For many years the State Department of Education (usually termed the "Regents") to which the Court "has entrusted a certain amount of supervision over the preliminary education requirement," has conducted special examinations for prospective law students. These examinations, unlike those in Pennsylvania, were not a general requirement, but were supplementary, as an additional means of qualifying, for those who could not secure high school certificates. These supplementary examinations were abolished by a rule of the Regents effective January 1, 1928. Meanwhile, the Court of Appeals itself had adopted a rule requiring one year of college work, or its equivalent. This rule applies to applicants beginning their law studies after October 15, 1928. After October 15, 1929, two years of college work or its equivalent will be required. Since the law schools open shortly before October 15, these rules will first become effective in the academic years 1929-30 and 1930-31 respectively.

In Ohio, the rule requiring two years of college work, or its equivalent, adopted in 1926, came into full effect in 1928. Colorado postponed the application of a similar rule, raising the requirement from one to two years of college, until the academic year 1928-29, instead of 1927-28, as previously announced. However, this concession is made up for by other provisions restricting the qualifications. The academic requirements must now be satisfied before beginning the period of law study, instead of within six months thereafter, as previously permitted.

On the other hand, the West Virginia Board of Law Examiners have recently interpreted the Court Order of 1924, which requires "A preliminary academic education equivalent to two years of study in a college," to mean that a special examination, if necessary, to show the equivalent of two years college work, may be taken at any time prior to admission to the law examination. This interpretation, the Annual Review points out, recognizes as "preliminary" general education cram work pursued during intervals of law study.

The required period of law school study, recent changes indicate, is also tending to be increased to more than three years in law schools of a certain type. Thus Louisiana has provided that applicants from a four-year law school shall not be examined until they have finished the four year course. Pennsylvania, by amendment adopted October 5, 1928, has restricted the privilege of qualifying in three years to those who complete the regular course of study in a full-time law school requiring an average of at least ten hours' instruction per week. Colorado, by a rule which will not go into effect until after autumn, 1929, requires four years in the case of night law schools outside the state.

Office study seems to be discouraged by rules adopted in three states during 1928. The Colorado rule that at least one of the three required years of law study must be spent in a law school came into effect; the date when two years of law school work will be required was pushed forward, however, so as not to affect applicants examined prior to January 1, 1930. Louisiana, after December 31, 1928, requires students under supervision, other than in law schools, to register at the beginning of their period of law study, and to keep the Examining Committee advised of any changes in their course. Wisconsin has strengthened its rule affecting office students by requiring reports of their progress to be rendered every three months.

Pennsylvania, on the contrary, has recently joined the small group of states which insist on a certain amount of office work. A rule requiring six months' of office clerkship, which may be interpolated into school vacations, became effective

January 1, 1928. Furthermore, rules have been adopted requiring students, even while in law school, to be registered with a preceptor, and providing elaborate methods of proving their good moral character.

In Canada, a rule adopted in Saskatchewan requiring two years of college work became effective after October 1, 1927. In Newfoundland the minimum of general education required before beginning the study of law has been raised from less than high school to the equivalent of one year of college, and applicants who present an additional year are allowed a corresponding reduction of their period of law study.

ARRANGEMENTS FOR MEMPHIS MEETING

TO be held at Memphis, Tennessee, October 23, 24, 25, 1929. HEADQUARTERS: Hotel Peabody, Union Avenue and Second Street. Rates: Single rooms (one person) $4 to $7 per day; double rooms with double bed (two persons) $6 to $8 per day; double rooms with twin beds (two persons) $7 to $10 per day; parlor suites $12, $14, $15, $20 per day. All rooms have tub and shower bath and outside location.

Reservations and Hotel Information

Requests for reservations and information concerning the Peabody and other Memphis hotels should be addressed to the Executive Secretary, Olive G. Ricker, 209 South La Salle Street, Chicago, Illinois.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations stating (1) whether double or single room is wanted and if double the names of persons who will occupy it; (2) whether double or twin beds are preferred; (3) the approximate rate; (4) date of arrival, including definite information as to whether such arrival will be in the morning or evening.

Every effort will be made to comply with requests made, as far as available accommodations will permit. Reservations should be made as early as possible.

Railroad Transportation

Individual identification certificates will be sent all members of the Association prior to the meeting, enabling them to secure a reduction of 25 percent in railroad fare to and from Memphis.

National Conference of Commissioners on Uniform State Laws

The Conference will be held in Memphis on October 14-19, with the Peabody Hotel as headquarters.

Reservations of hotel rooms should be made through Mrs. Olive G. Ricker, Executive Secretary of the American Bar Association, 209 South La Salle Street, Chicago, Illinois.

The tentative program of this Conference will be published in a later issue of the Journal.

ADDITIONAL HOTEL ACCOMMODATIONS

HOTEL	Distance from Headquarters	Single	2 Persons—Double Bed	2 Persons—Twin Beds	Without Bath Single	Without Bath Double
Adler	3 Blocks	$2.00 to $2.50	$3.50 to $4.00	$4.00	$1.50	$2.50
Ambassador	5 Blocks	$2.00	3.50 to 4.00	4.00	1.50	$2.50 to $3.00
Catholic Club (for men)	5 Blocks				150 (Shower bath available)	$2.50
Chisca	7 Blocks	$2.50 to $5.00	4.50 to 5.50	$5.00 to $6.00	$2.00 to $2.50	$3.00 to $4.00
Claridge	6 Blocks	3.00 to 4.00	4.50 to 6.00	6.00 to 7.00		
Elk's (for men and women)	5 Blocks	2.00 to 3.50	4.00 to 6.00			
Gayoso	3 Blocks	250 to 5.00	4.50 to 7.50	5.00 to 7.50	2.00 to 2.50	3.50 to 4.00
Hermitage (for men)	1 Block		$3.00	$4.00	$1.00	
Tennessee	Across Street	2.00 to 3.00	$3.50 to $5.00	$5.00 to $6.00		
Forrest Park Apartments	1 Mile	Parlor, Bedroom, Bath and Kitchenette $4.00 to $6.00.				
Parkview Apartments	3 Miles	Parlor, Bedroom, Both and Kitchenette $8.00 to $10.00. Parlor, Bedroom and Bath, Single $4.00, Double $6.00. Regular Hotel Reservations, $3.50 Single and $5.00 Double.				

Opening Session of Seventh Annual Meeting of A

In Speaker's Stand, left to right: Director W
sham, Vice-President James Byrne, Judge

eting of American Law Institute, at Washington, D.C.

r Lewis, Chief Justice Taft, President Wicker-
and Treasurer George Welwood Murray

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JOSEPH R. TAYLOR, MANAGER
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209 South La Salle St., Chicago, Illinois

WHAT THE JOURNAL STANDS FOR

A member of the Association writes to ask "What does the JOURNAL stand for? Why does it not adopt some definite program of improvement in some branch of the law or its administration and stay with it until it accomplishes something?"

That is a perfectly fair question and it gives the JOURNAL pleasure to answer it. The JOURNAL stands for exactly what the American Bar Association indorses and supports. It is the official organ of the Association and not a private publishing enterprise. Its business is not to develop an independent character and follow a career of its own choosing, perhaps apart from the direction in which the Association itself is moving. While its official character may involve limitations, it also has its advantages. One of these, we have heretofore been inclined to think, was that there could be very little doubt as to what it stands for.

The foregoing seems to answer the second inquiry which the member propounds. The JOURNAL does not have to adopt "some definite program of improvement in some branch of the law" because that has already been done by the Association itself. It has even gone beyond that and adopted several definite programs of improvement dealing with several branches of the law. In so far as its space permits, the JOURNAL has done its best to support the outstanding features of these programs.

To select one thing only, as suggested, and stay by that until something has been accomplished, would be to make the JOURNAL representative of only one of the many items of the Association's plans and purposes. While attention was concentrated on one thing, other things of probably equal importance would have to be neglected. Such a course might give an appearance of unity and energy and resolution to the JOURNAL's program. But if it took a long time to accomplish the desired end, it would doubtless also become extremely tedious for the vast majority of readers.

One feature of the Association's program to which the JOURNAL has devoted particular attention is the movement to raise the educational standards for admission to the Bar. Another feature is the maintenance of high ethical standards for the profession, and the JOURNAL has done what it could to cooperate in this worth-while effort. Another item in the Association's program is defense of the Courts against encroachments on their necessary powers, and here the JOURNAL has faithfully represented the organization's attitude. These are but single instances gathered out of a great number of undertakings by the Association for the improvement of the administration of Justice—all of which have been reflected, at least to some extent, in the columns of the JOURNAL.

Apart from reflecting the general attitude and supporting the specific plans of the Association, the JOURNAL endeavors to print informative articles on a wide variety of legal subjects; to keep the membership informed of important developments in legal fields beyond those which the Association cultivates; to chronicle as far as possible the major activities of the State and local Bar Associations; and, within the limitations of its space, to provide a forum for the discussion of matters of general interest to the profession.

All this constitutes a program quite sufficient to occupy the JOURNAL's attention and one which, we hope, has not been wholly without some measure of accomplishment.

NEGLECTED RELATIONSHIPS OF THE LAW

Very little attention has heretofore been given to the close relation between the practice of law and fishing, hunting, golfing, gardening, motoring, not to mention a number of other pursuits of equal importance. To remedy this unfortunate state of affairs, so prejudicial to the profession, the JOURNAL is preparing to publish a series of brief articles on the relation of law and the subjects mentioned, beginning with the July issue.

In that number Mr. Andrew Price of Marlinton, West Virginia, leads off with a contribution on Fishing that leaves nothing to be desired—except a chance to go a-fishing. Mr. Price's preeminent qualifications to speak with authority on this subject, particularly in its le-

gal aspects, will become evident to anyone who reads the first few paragraphs. Of equal authority in their respective fields are those who will contribute to subsequent numbers. These include Mr. Silas H. Strawn of Chicago, who will write on Golf; Mr. Horace K. Tenney, of Chicago, whose subject will be Hunting; Sidney S. Gorham, President of the Chicago Bar Association, who knows his Motoring; Judge Walter P. Steffen, of the Superior Court of Cook County, Chicago, who is still a football coach and will write on that subject; and certain other gentlemen, from whom acceptances have not been secured who will relate the Law to Mountain-Climbing, Camping, Gardening and other subjects.

It has been suggested, with much reason, that the problem of the overcrowding of the profession may be at least partially solved by the publication of such a series. So attractive will these pursuits necessarily become to attentive readers, that many who have heretofore ignored them will no doubt find it impossible to resist their lure. This will obviously operate to decrease professional competition.

A USEFUL ANTIDOTE

In an article in the April issue Mr. Sweet calls attention to the personal element generally involved in views about the jury system. He intimates that the successful jury lawyer is likely to think well of the system. The lawyer who has little to do with juries more easily restrains his admiration.

This is human nature. Much of what passes as carefully thought-out opinion is merely the generalized impressions of the individual. The arguments that go with it are not so much the basis of the opinion as an attempted rationalization of a view grounded more or less on personal feeling and attitude and, perhaps, personal interest. The rationalization may be so complete and satisfactory as to support the opinion fully. In such case there is a natural tendency to refer it back to the beginning of the process of opinion-forming. As a matter of fact it is a subsequent stage.

In the field of improvement in the administration of Justice we see this tendency to generalize personal experience and impression illustrated fully and frequently. Fortunately the work of preparing a successful antidote is going steadily forward. Numerous and well organized studies of the data furnished by years of experience are bringing out the impersonal facts from which alone sound generalizations may be made. They are eliminating the personal views from the process, even though they may confirm some of them in the conclusions reached.

DEBATES ON THE JURY SYSTEM

A mild sort of debate as to the merits of the jury system, as at present constituted, has been going on in the JOURNAL for several years. It will probably go on for several years more, as radical changes are hardly to be anticipated in the near future.

But this debate is as nothing compared to that which has been raging on the jury system during the past year in the colleges and high schools and other educational institutions of the country. We speak advisedly because we have had much correspondence on the subject, ranging from a request for back copies of the JOURNAL to practically an ingenuous suggestion that we furnish the outlines of all the arguments on both sides—with emphasis on the correspondent's side, of course. Our supply of several issues containing articles about the jury system was exhausted long ago.

EXECUTIVE COMMITTEE MEETING

The Executive Committee held a meeting at Washington, D. C., on May 6, 7, and 8, President Newlin presiding. All the members were present except Mr. Boston. The committee had before it various communications with respect to repeal of the Volstead Act and related prohibition matters, but it declined to take any action as it decided it was not authorized to speak for the Bar on that subject.

It recommended an amendment to the by-law defining the powers of the Committee on Professional Ethics so as to make it perfectly clear that that body could answer questions relating to judicial ethics, and also take action on charges involving the same. This proposed amendment will be published in due course as required by the Constitution.

The Committee heard the report of the special committee to consider securing a permanent home for the Association and discussed it at length, but took no action.

Reports of officers showed that the various agencies of the Association were functioning satisfactorily.

REVIEW OF RECENT SUPREME COURT DECISIONS

Statute Making Insolvency of Bank Presumptively Fraudulent and Subjecting President and Directors to Imprisonment Held Violation of Due Process—Power of Interstate Commerce Commission to Fix Railroads' Compensation for Transporting Mail — Actions Under Federal Employers' Liability Act, Amount of Evidence Required, Computation of Damages, Assumption of Risk, Negligence of Deceased—Liability of Carriers for Accident in Course of Journey Over Two Railroads—Lever Act Empowering President to Fix Price of Coal Held Valid

By Edgar Bronson Tolman*

Banking—Presumption of Fraudulent Insolvency

In view of its statutory definitions of insolvency the statute of Georgia providing that insolvency of a bank shall be presumed to be fraudulent and subjecting its president and directors to imprisonment, unless the presumption is rebutted by them, is arbitrary and unreasonable.

Manley v. State of Georgia, Adv. Op. 232; Sup. Ct. Rep. Vol. 49, p. 215.

As early as 1833 a statute was enacted in Georgia embodying a presumption of fraudulent insolvency, substantially like that here in question. It provides that

> "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner."

Its meaning, however, has been changed recently by a statute which defines insolvency in these terms:

> "A bank shall be deemed to be insolvent, first, when it cannot meet its liabilities as they become due in the regular course of business; second, when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; third, when its reserve shall fall under the amount herein required and it shall fail to make good such reserve within thirty (30) days after being required to do so by the Superintendent of Banks."

Before the enactment of this statutory definition none of the conditions was deemed insolvency.

From a judgment of conviction in the state courts under the statutory presumption Manley appealed, contending that it violated his rights under the due process clause of the Fourteenth Amendment. His contention was sustained by the Supreme Court in an opinion by Mr. Justice Butler. The state courts had upheld the presumption on an analogy to the doctrine of *res ipsa loquitur* in civil cases, and had maintained that the proviso permitting rebuttal of the presumption saved its constitutionality.

The Supreme Court's reasons for adopting a contrary view were stated in the opinion, as follows:

> State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. If the presumption is not unreasonable, and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. . . . A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. . . . Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. "It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." . . .
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> The presumption here involved does not rest upon any definite basis. It is raised upon proof of any one or more of the conditions described as insolvency and without regard to the facts from which such condition resulted. The statute does not specify the elements of the offense; and so the inference is not restricted to any particular point or specific issue. The facts so to be presumed are as uncertain and vague as the terms "fraudulent" and "fraud," contrasted with "fairly," "legally," "honestly," and "in accordance with law," when used to describe the management of a bank. . . . Nor is the generality of the presumption aided by the allegations of the accusation. The indictment merely follows the general words of the statute without specifying facts to disclose the nature or circumstances of the charge. . . . And as to guilt also, the presumption is sweeping. It extends to all directors. There may be from three to twenty-five. The president is required to be a director.
>
> The presumption extends to the *corpus delicti* as well as to the responsibility of the president or director accused. The proof which makes a prima facie case points to no specific transaction, matter or thing as the cause of the fraudulent insolvency or to any act or omission of the accused tending to show his responsibility. He is to be convicted unless he negatives every fact, whether act or omission, in the management of the bank, from which fraudulent insolvency might result or shows that he is in no way responsible for the condition of the bank.
>
> Inference of crime and guilt may not reasonably be drawn from mere inability to pay demand deposits and other debts as they mature. In Georgia banks are permitted to lend up to 85 per cent of their deposits. Unforeseen demands in excess of the reserves required do not tend to show that the crime created by §28 has been committed. The same may be said as to the other conditions defined as insolvency. The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other. . . . The presumption created by §28 is unreasonable and arbitrary.

The case was argued by Messrs. Marion Smith and W. T. Colquitt for appellant, and by Mr. Reuben R. Arnold for appellee.

*Assisted by Mr. James L. Homire.

Interstate Commerce Commission—Rates for Transportation of Mail

The Interstate Commerce Commission has power to fix the rates of compensation for the transportation of mail, and the orders fixing such rates may be made effective retroactively to the date of the filing of applications for such orders.

United States v. New York Central R. R. Co. Adv. Op. 305; Sup. Ct. Rep. Vol. 49, p. 260.

The railroads here applied to the Interstate Commerce Commission in 1921 for an adjustment of compensation for carrying the mails retroactively and for the future. The Commission at first held that it was empowered to estabish rates only as to the future. It later made new orders, however, establishing the same rates for the time intervening between the filing of the applications and the date of the orders first made. The Postmaster General refused payment, and the railroads thereupon recovered judgments in the Court of Claims on the basis of the later orders. These judgments the Supreme Court affirmed on certiorari in an opinion delivered by MR. JUSTICE HOLMES. He briefly stated the issues and the grounds of the decision as follows:

> The ground taken by the United States is that the Interstate Commerce Commission had been given no authority to change the rates of payment to be received by the railroads for any time before its orders went into effect. The question is one of construction which requires consideration not of a few words only, but of the whole Act of Congress concerned. This is the Act of July 28, 1916, c. 261, §5; 39 St. 412, 425-431 (C., Tit. 39, ch. 15, where the long §5 is broken up into smaller sections) which made a great change in the relations between the railroads and the Government. Before that time the carriage of the mails by the railroads had been regarded as voluntary, . . . now the service is required (C., Tit. 39, §541) refusal is punished by a fine of $1,000 a day (C., Tit. 39, §563), and the nature of the services to be rendered is described by the statute in great detail. Naturally, to save its constitutionality there is coupled with the requirement to transport a provision that the railroad shall receive reasonable compensation. The words are "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." The Government admits, as it must, that reasonable compensation for such required services is a constitutional right. So far as the Government has waived its immunity from suit this right may be enforced in the absence of other remedies not only by injunction against further interference with it but by an action to recover compensation already due. Accordingly the statute provides for application from time to time to the Interstate Commerce Commission to establish by order a fair, reasonable rate or compensation to be paid at stated times. C., §542, 551, 554.
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> We assume that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint. . . . But the filing of an application expresses a present dissatisfaction and a demand for more. A further protest would be a superfluous formality. If the claim of the railroads is just they should be paid from the moment when the application is filed. In the often quoted words of Chief Justice Shaw, "If a pie-powder court could be called on the instant and on the spot the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." . . . In fact the necessary investigation takes a long time, in these cases, years, but reasonable compensation for the years thus occupied is a constitutional right of the companies no less than it is for the future. . . . This being so, and the Interstate Commerce Commission being the tribunal to which the railroads are referred it is a natural incident of the jurisdiction that it should be free to treat its decision as made at once. Obviously Congress intended the Commission to settle the whole business, not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act. No reason can have existed for leaving the additional annoyance and expense of a suit for compensation during the time of the proceedings before the Commission, when the Commission has had that very question before it and has answered it at least from the date of its orders. We are quite aware that minutiae of expression may be found that show Congress to have been thinking of the future. We put our decision not on any specific phrase but on the reasonable implication of an authority to change the rates of pay which existed from the day when the application was filed, the manifest intent to refer all the rights of the railroads to the Interstate Commerce Commission, and the the fact that unless the Commission has the power assumed a part of the railroad's constitutional rights will be left in the air.

The case was argued by Solicitor General Mitchell for petitioner and by Messrs. Frederick H. Wood and George H. Fernald Jr., for respondent.

Federal Employers' Liability Act—Evidence—Damages

In actions under the Federal Employers' Liability Act more than a scintilla of evidence is required to justify the submission of the case to the jury.

The defendant is entitled to a proper instruction in a death case as to the earning power of money in determining the present value of anticipated benefits; but where the charge is proper, the defendant cannot avail itself of an objection that the charge was not sufficiently detailed, when it failed to request a further charge.

Western & Atlantic R. R. vs. Hughes: Adv. Op. 268, Sup. Ct. Rep. Vol. 49, p. 231.

The plaintiff here sued under the Federal Employers' Liability Act as the administratrix of one Hughes, a fireman. He had been killed by being knocked from the running board of a locomotive while crossing a bridge. The theory of liability advanced by the plaintiff was that the death had resulted from the defendant's negligence in permitting the track leading to the bridge to remain in bad condition. This consequently had caused an unusual rocking of the engine crossing the bridge, so that Hughes was knocked off and killed.

The railroad denied these allegations and asserted that the injury had resulted from Hughes' negligence and disobedience of rules; it claimed further that Hughes had assumed the risk and requested direction of a verdict. This was denied and judgment went for the plaintiff on a verdict.

On a writ of certiorari in review of the case, MR. JUSTICE BRANDEIS delivered the opinion of the Court. Although the Supreme Court found no ground for reversal in the record, occasion was taken to discuss two rules of the federal courts in cases of this sort—the rule requiring more than a scintilla of evidence to go to the jury and the rule of damages to be applied. With reference to them MR. JUSTICE BRANDEIS said:

> The Railroad asserts that the scintilla of evidence rule prevails in Georgia; and argues that the lower courts erred by applying the local rule in this case. It is true that submission to the jury of contested issues of fact is not required in the federal courts, if there is only a scintilla of evidence . . . that it is the duty of the judge to direct the verdict, when the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict for the other party; . . . and that this federal rule must be applied by state courts in cases arising under the Federal Employers' Liability Act. . . . We need not consider whether the rule prevailing in Georgia differs substantially from the federal rule. For even under the federal rule it was proper to submit the case to the jury. The evidence

introduced by the plaintiff was substantial; and was sufficient, if believed, to sustain a verdict in her favor. . . .

The Railroad contends also that there was error in assessing the damages. It argues that nominal damages only were recoverable since the plaintiff failed to introduce evidence either as to the proper method of computing the present value of the anticipated benefits or as to the rate of interest which should be applied in doing so. The evidence was ample. Among other things, there were mortality tables introduced by the plaintiff and annuity tables offered by the Railroad—tables in which values were computed at both the six per cent and the seven per cent rate. The Railroad argues also that the charge failed to make it clear to the jury that, in computing the damages recoverable for the operation of future benefits, adequate allowance must be made, according to circumstances, for the earning power of money; that the verdict should be for the present value of the anticipated benefits; and that the legal rate of interest is not necessarily the rate to be applied in making the computation. . . . There is no room for a contention that the charge failed to state correctly the applicable rule. If more detailed instruction was desired, it was incumbent upon the Railroad to make a request therefor. . . . It did not do so.

The case was argued by Mr. Fitzgerald Hall for petitioner, and by Mr. Reuben R. Arnold for respondent.

Federal Employers' Liability Act—Assumption of Risk

In an action under the Federal Employers' Liability Act a verdict should be directed for the defendant where the evidence establishes conclusively that the employee fully understood and appreciated the risk involved in the existence of the dangerous condition complained of, or where the evidence fails to show any negligence on the part of the defendant.

Delaware, Lackawanna & Western R. R. Co. v. *Koske,* Adv. Op. 234; Sup. Ct. Rep., Vol. 49, p. 202.

The respondent Koske had sued under the Federal Employers' Liability Act in a New Jersey court to recover injuries sustained by him while engaged in interstate commerce. He alleged that the defendant railroad had permitted an open uncovered, unlighted and dangerous hole to exist between certain parts of the tracks and that at four o'clock on June 4, 1925, while alighting from an engine, he was injured.

It appeared that the plaintiff had worked at the place for some years, partly in the daytime, and was familiar with the tracks and ground there. It further appeared that there was a drainage ditch or trench at a place not far from the coal chute where the plaintiff was often engaged in his work. The case was tried upon the theory that part of this trench was the hole into which the plaintiff jumped when he was injured.

The defendant moved for a directed verdict on the theory that it conclusively appeared from the evidence that the plaintiff had assumed the risk of the accident and injury complained of, and upon denial of this motion judgment was entered on a verdict for the plaintiff. Upon affirmance of this judgment by the court of last resort in New Jersey, the Supreme Court granted certiorari and reversed the case. MR. JUSTICE BUTLER delivered the opinion of the Court, first observing that the judgment could not be affirmed on the suggestion of the plaintiff that the hole in question was one other than that one alleged in the pleadings and considered at the trial. He then discussed the basis of liability and the doctrine of assumption of risk embodied in the federal act, saying:

The Federal Employers Liability Act permits recovery upon the basis of negligence only. The carrier is not liable to its employees because of any defect or insufficiency in plant or equipment that is not attributable to negligence. The burden was on plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him in respect of the place where he was injured and that in whole or in part his injuries resulted proximately therefrom. And, except as provided in §4 of the Act, the employee assumes the ordinary risks of his employment; and, when obvious or fully known and appreciated, he assumes the extraordinary risks and those due to negligence of his employer and fellow employees. . . .

The record contains no description of the place where plaintiff was injured other than that above referred to. Fault or negligence may not be found from the mere existence of the drain and the happening of the accident. The measure of duty owed by defendant to plaintiff was reasonable or ordinary care having regard to the circumstances. . . . There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and the drainage systems therein to the uncertain and varying judgment of juries. . . . The evidence is not sufficient to warrant a finding that defendant was guilty of any breach of duty owed to plaintiff in respect of the method employed or the condition of the drain at the time and place in question. . . .

The court takes judicial notice of the fact that for some weeks immediately before the accident the sun rose and it was light for some time before plaintiff's quitting hour. . . . He worked in daylight for some time every morning during the spring and summer months, and during one year he worked days. There was nothing obscure or of recent origin about the place where he was injured. The conditions were constant and of long standing. The evidence requires a finding that he had long known the location of the drain and its condition at the place in question. The dangers attending jumping from engines in the vicinity of the drain, especially in the dark, were obvious. Plaintiff must be held to have fully understood and appreciated the risk.

It was the duty of the judge presiding at the trial to direct the jury to return a verdict in favor of the defendant. . . .

The case was argued by Mr. Walter J. Larrabee for petitioner and by Mr. I. Faerber Goldenhorn for respondent.

Federal Employers' Liability Act—Basis of Liability

In an action to recover damages for death under the Federal Employers' Liability Act where the evidence shows without substantial contradiction that the deceased knowingly stood in a dangerous place at the time of the accident, and that there were several other places which he might have occupied with safety, the negligence of the deceased was the sole cause of death and a verdict should be directed for the defendant.

Atlantic Coast Line R. R. Co. v. *Davis,* Adv. Op. 230; Sup. Ct. Rep., Vol. 49, p 210.

This action was brought in a court of South Carolina by the administrator of the estate of one Richards, who was killed while an employee of the petitioner, an interstate railroad, to recover damages for his death. The theory of the action relied on by the plaintiff was that the defendant had failed to provide the deceased with a safe place to work. The defendant urged that the evidence showed no negligence on its part and asked for the direction of a verdict in its favor. Judgment was entered on a verdict for the

plaintiff which the Supreme Court of South Carolina affirmed.

To review this ruling the Supreme Court granted certiorari and subsequently reversed the judgment in an opinion delivered by MR. JUSTICE SANFORD.

A detailed statement of the case is contained in the opinion which discloses the following facts. Richards was a flagman in a train crew. This crew was furnished by the defendant to operate a locomotive which was provided to haul dump cars furnished by an independent contractor. The contractor was engaged in excavating operations in connection with filling in trestles on the railroad. The loading of excavated dirt into the dump cars required them to be moved frequently and signals for movement were given sometimes by the use of a whistle on a steam shovel used for loading, and sometimes by a laborer, known as a "spotter," in the employ of the contractor. Sometimes the signals were given by members of the train crew but, if so, they acted voluntarily.

When the shovel was situated so that a full swing of the boom was required to carry the dirt from the place of excavation to the dump cars, a portion of it called a "jack-arm," (sometimes occupied by the spotter) became dangerous. At such times part of the shovel apparatus would swing so as to crush anyone standing there. This Richards knew. He had been warned against it. But, nevertheless, while so engaged as a volunteer, he was killed, though it was shown by uncontradicted evidence that there were at least four other places where he might have stood in safety and beyond the reach of the swinging boom. It was upon substantially these circumstances that the Supreme Court reversed the judgment.

As to the law of the case, MR. JUSTICE SANFORD said:

> We pass without determination the question whether the case was properly submitted to the jury to determine whether Richards at the time of the accident was engaged within the scope of his employment by the Railroad Company or was merely aiding the contractor as a volunteer. However this may be it is clear that, even if the Railroad Company then owed him any duty in this respect, there was no substantial evidence that there was any negligence upon its part in failing to furnish a safe place in which to work. The evidence is undisputed that there were several places in which he could have stood in spotting cars, all of which were reasonably safe and well adapted to the performance of the work, and in which he could not have been struck by the swinging boom. And the inevitable conclusion from all the evidence is that he voluntarily abandoned the safe position on the running board which he at first assumed and placed himself in a position of extreme danger on the "jack-arm" a place not furnished for the performance of this work and ill adapted thereto, and one of obvious danger in which he would inevitably be struck if the boom made a full swing unless he moved out of its path; and thereby through his own negligence, as the sole and direct cause of the accident, brought on his own death. Under these circumstances there is plainly no ground upon which the liability of the Railroad Company may be predicated. . . .
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> The contention that Richards' death was caused by the negligence of the Railroad Company in any respect in which it owed a duty to him is without any substantial support; and the jury should have been instructed to find for the Railroad Company.

The case was argued by Mr. Thomas W. Davis and Mr. Henry E. Davis for petitioner and by Mr. William C. Wolfe for respondent.

Foreign Corporations—Jurisdiction—Liability of Carrier

Where a foreign railroad corporation does some business in a state and maintains an agent there for receiving service of process, the jurisdiction of a federal court sitting in the district extends to a transitory cause of action arising out of an accident outside the state during a journey for which passage was sold in the state by another foreign corporation as agent of the defendant sued.

In such case, if both carriers are sued, they are entitled to proper instructions giving effect to contract and tariff provisions relating to separate liability.

Louisville & Nashville v. Chatters, Adv. Op. 382; Sup. Ct. Rep. Vol. 49, p. 329.

The plaintiff here brought suit in a District Court in Louisiana to recover for personal injuries against the Louisville & Nashville Railroad Company and the Southern Railway Company. The plaintiff was a citizen of Louisiana; the Southern is a Virginia corporation, and the Louisville & Nashville is a corporation of Kentucky. Process was served on the defendants on their designated agents in Louisiana.

The injuries occurred in Virginia while the Southern was operating the train. The ticket for the journey was purchased in New Orleans and entitled the passenger to passage from New Orleans to Washington, partly on the line of the two defendants and partly on another road. Each road furnished crew and motive power over its own lines, and during such time had exclusive control of the train.

The Southern appeared specially and excepted to the District Court's jurisdiction on the ground that, since the action was transitory and arose outside of Louisiana, and not out of business transacted by it there, the court was without jurisdiction. This exception was overruled. Both defendants took exceptions to the charge of the court at the trial. The Circuit Court of Appeals affirmed judgment for the plaintiff, and the Supreme Court granted certiorari.

It then reversed the judgment in an opinion delivered by MR. JUSTICE STONE. The ruling of the trial court on the jurisdictional question however, was held sound. Introductory to consideration of this aspect of the case, the rule as to jurisdiction over transitory causes of action was stated in the following language:

> A foreign corporation is amenable to suit to enforce a personal liability if it is doing business within the jurisdiction in such manner and to such extent as to warrant the inference that it is present there. . . . Even when present and amenable to suit it may not, unless it has consented . . . be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction.

For purposes of the decision it was assumed that consent to suit by process served on the designated agent would not extend to a cause of action arising outside the state and unconnected with its business there. Various aspects of the business transacted by the Southern in Louisiana and the effect of the sale of tickets on its behalf by the Louisville & Nashville were then considered and found sufficient to confer jurisdiction. It was noted that the Southern maintains an office and agents in Louisiana for the solicitation of business, that it sells tickets there, that it maintains an agent there for service of process, and that consequently it can undoubtedly be sued there on at least some causes of action.

The discussion then turned to the narrow question whether sale of the ticket by the Louisville & Nashville rather than by the Southern removed the latter from jurisdiction for suit on this cause of action. With reference to this the Court said:

> But the sale in Louisiana of the ticket for transportation over the Southern was made by the Louisville &

> Nashville under the filed joint tariff as the agent and for account of the Southern. In its legal effect it was the act of the Southern within the jurisdiction by which its obligation to respondent on the contract of carriage over its own lines became complete. It was out of this action within the state that the present obligation of the Southern arose, although the alleged breach of it occurred elsewhere. . . .
>
> Since the Southern was present and subject to suit in Louisiana, we are concerned, not with the question whether the sale of the ticket was sufficient to bring it there, but only with the question whether, being there, its liability extended to all causes of action arising out of its corporate acts within the state, including this one. . . .
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> Once established that the foreign corporation is within the state for purposes of suit, its presence for that purpose would seem to be co-extensive with its presence for the purpose of carrying on any corporate transaction within the jurisdiction and, granted the former, its liability to suit on causes of action growing out of the latter should follow. To say that not every corporate act within the jurisdiction is sufficient to establish its presence there for the purpose of suit is very different from saying that a suit founded upon such an act may not be maintained there, once its presence and consent to suit are established.
>
> We decide only that, in the absence of an authoritative state decision giving a narrower scope to the power of attorney filed under the state statute, it operates as a consent to suit upon a cause of action like the present arising out of an obligation incurred within the state although the breach occurred without.

The other question considered in the opinion was the nature of liability of the two defendant carriers. The ticket sold by the Louisville & Nashville contained a provision that it acted as an agent in selling the ticket and was not responsible beyond its own line. The tariffs filed with the Interstate Commerce Commission contained a similar provision. In view of these the Louisville & Nashville asked for a directed verdict and for an instruction that if the jury found that the accident did not occur on its line it was not liable. Both were refused, and the court charged the jury that liability was joint and that if no explanation of the accident was given both defendants would be presumed to be liable.

> But there was no basis, either in pleading or proof, for a joint liability of both petitioners for the negligence of one. Neither of them, as a common carrier, was under any duty, either by the common law or statute, to transport or assume any responsibility for the transportation of respondent beyond its own line. . . . The Louisville & Nashville, therefore, might, by stipulation on the through ticket, provide that it should not be so responsible . . . and in any case, the transportation service to be performed was that of a common carrier in interstate commerce under published tariffs and the attendant limitation of liability in the tariff became the lawful condition upon which the service was rendered, binding alike on the carrier and its patron. . . . There was, therefore, no evidence of joint liability of the petitioners in the case, and there could be no liability of either for injury to respondent occurring beyond its own line except on the theory that its own negligence caused or contributed to the injury.

Error was also found in the refusal of the court to direct a verdict for the Louisville & Nashville.

> There was no evidence of the precise cause of the loosening of the screen which caused the injury. Whether the screw which fastened it was improperly replaced by the employees of the Louisville & Nashville after cleaning the window, or whether it broke or otherwise became loosened on account of some hidden or unascertainable defect, or was loosened by others than the employees of either petitioner, does not appear.

Further error was noted in the charge so far as it made the Southern liable for negligence of the Louisville & Nashville.

> The jury was in effect told to return a verdict against both petitioners on a finding of negligence on the part of either. As there was evidence of repeated inspections of the window screens by the Southern after the car reached its line and before the accident, from which the jury might have found that there was no want of care on the part of the Southern, the jury may have found that the accident was due to the negligence of the Louisville & Nashville and so have returned a verdict against both. Even though the issue of the Southern's own negligence was for the jury, it was entitled to have the issue submitted unprejudiced by the erroneous instruction which authorized a verdict against the Southern on the theory of joint liability if the jury should conclude that the Louisville & Nashville alone was negligent.

The case was argued by Mr. Harry McCall for the Louisville & Nashville R. Co., Mr. J. Blanc Monroe for the Southern R. Co., and by Mr. George Piazza for respondent.

Constitutional Law—Price-Fixing Under War Power

The Lever Act empowering the President to fix the price of coal by executive order is valid, and dealers selling coal are bound by the price so fixed, in their contractual relations with buyers.

Highland v. Russel Car & Snow Plow Co., Adv. Op. 321; Sup. Ct. Rep. Vol. 49, p. 314.

The opinion here dealt with the validity and effect of an executive order under the Lever Act fixing the price of coal. The plaintiff mined coal and made an agreement with the defendant for the sale and delivery of a carload a week at a certain price. The seller subsequently raised this price and notified the buyer that unless he signified otherwise the seller would continue to ship at the advanced price. The prices were in excess of those fixed by executive order, and the defendant had paid more than the total value of the coal as fixed by such order. The plaintiff sued to recover the difference between the amount paid and the prices mentioned in the correspondence. The defendant, buyer, was engaged in the manufacture of snow plows for railroads.

The state courts of Pennsylvania held that the plaintiff was bound by the price fixed and gave judgment for the defendant. On review by certiorari this was affirmed by the Supreme Court in an opinion delivered by MR. JUSTICE BUTLER.

He first stated the contention of the plaintiff, which was that the executive order deprived him of liberty of contract in violation of the Fifth Amendment. The statement of this contention in the opinion emphasized that the plaintiff's coal was not requisitioned; that there was no taking without just compensation; that there was no contention that the price fixed was unreasonable; and that the sole question was whether the plaintiffs' constitutional rights had been infringed, by preventing him from selling at a price in advance of what he could have obtained, had the coal been taken by eminent domain.

In rejecting this contention the Court reviewed acts of Congress during the war designed to promote effective utilization of the resources of the country for successful prosecution of the war. It was pointed out that a panic among consumers of coal had caused it to advance to an alarmingly high price level. Consequently the Lever Act empowered the President to fix the price of that commodity.

> The basis prescribed for the determination of prices to be charged by producers of coal was the cost of production, including the expense of operation, maintenance, depreciation and depletion plus a just and reasonable profit. And prices to be charged by dealers were to be made by adding to their cost a just and reasonable sum for profit. The Act did not require producers or dealers to sell their coal. It provided for the ascertainment and contemplated the payment of just compensation for all property that it authorized the President to take.

The urgency of the defendant's need for coal and the needs of the community generally were emphasized.

> Defendant was engaged in manufacturing snowplows for railroads. Unquestionably, the production of such equipment was in the state of war then prevailing a public use for which coal and other private property might have been taken by exertion of the power of eminent domain. When regard is had to the condition of the coal industry, plaintiff's control of the product of the mines referred to in his letters and the tone of his price quotations support the view that, in the interest of national safety, there was need of regulation in order to prevent manipulations to enhance prices by those having coal for sale and to lessen apprehension on the part of consumers in respect of their supply and the prices liable to be exacted.

Brief reference was then made to decisions holding that the Fifth and Fourteenth Amendments generally protect freedom of contract but it was noted that that liberty is not absolute, and must yield when necessary to the advancement of the purposes which the national government was organized to accomplish.

The existence of such necessity here was demonstrated in the concluding paragraph of the opinion, as follows:

> Under the Constitution and subject to the safeguards there set for the protection of life, liberty and property . . . the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on. . . . The measures here challenged are supported by a strong presumption of validity, and they may not be set aside unless clearly shown to be arbitrary and repugnant to the Constitution. . . . The principal purpose of the Lever Act was to enable the President to provide food, fuel and other things necessary to prosecute the war without exposing the government to unreasonable exactions. The authorization of the President to prescribe prices and also to requisition mines and their output made it manifest that, if adequate supplies of coal at just prices could not be obtained by negotiation and price regulation, expropriation would follow. Plaintiff was free to keep his coal, but it would have been liable to seizure by the government. The fixing of just prices was calculated to serve the convenience of producers and dealers as well as of consumers of coal needed to carry on the war. As it does not appear that plaintiff would have been entitled to more if his coal had been requisitioned, the Act and orders will be deemed to have deprived him only of the right or opportunity by negotiation to obtain more than his coal was worth. Such an exaction would have increased the cost of the snowplows and other railroad equipment being manufactured by the defendant and therefore would have been directly opposed to the interest of the government. As applied to the coal in question, the statute and executive orders were not so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment.

The case was argued by Mr. Ira Jewell Williams for petitioner and by Mr. A. M. Liveright for respondent.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

A *Treatise on the Law of Banks and Banking*, by John T. Morse, Jr. Sixth Edition, Revised by Harvey C. Voorhees. Boston: Little, Brown & Company. 1928. In two volumes, pp. 2134.—The first edition of this treatise was published by John T. Morse, Jr., of the Boston Bar in 1870. The work was carefully written and was most helpful to practitioners at a time when there were few works on this important subject. It reviewed the rights of depositors, the powers and duties of officers, and the liability of banks.

With the passing of years these subjects have assumed greater importance as financial institutions have become essential factors in all activities of trade and commerce. In the half century since the first edition was published there have been many changes in the law and in the dealings of banks. These transactions touch many relations between a bank and a customer, and as trade has increased many and varied problems have been presented for decision. Numerous novel and perplexing questions have been presented by and against banks, and the development of the law affords a wide field for review; the subject may still justify an authoritative text-book.

The first edition comprised less than 500 pages with an appendix containing the National Bank Act in effect June 3, 1864; the table of cases there cited comprised only 35 pages. There have since been several editions of this work, and the sixth edition, revised by Harvey C. Voorhees, might have been more helpful if the text had set forth principles supported by authorities. Section 9 of Usage comprises a few lines, while the notes to that section, with copious references to authorities, comprise eleven pages. It is manifestly difficult to present a text-book in concise form which the profession may accept as authoritative; the present work seems rather a digest, and other digests are more comprehensive.

The modern trend of banking indicates that large aggregations of capital are sought; this gives greater influence and power to an institution, and suggests problems which may perhaps be more properly discussed by the statesman or philosopher, than in a text-book on banking. It has been said that "Banking is both an art and a science. As an art, it is a branch of trade intimately connected with every man's business; as a science, it forms an important portion of political economy."*

*History and Principles of Banking, by James William Gilbart, 1835.

And thus the student may wander far afield in a search for the controlling decision on many aspects of financial questions; it has been claimed, but unsuccessfully, that foreign money is merely a chattel (Brown v. Perera, 228 N. Y. 599), and the history of the medium of exchange is of great interest.

The attitude of jurists here and abroad presents questions of delicacy affecting the standards which a banking institution should maintain, for a strict regard by a bank to its standing may influence the general community. It is recognized that British banks have attained high repute from their policy of taking a broadminded, rather than a technical or legal position, in respect to matters that might affect their good name and reputation for fair dealing. The fact that decisions are made by the highest officers rather than by others fettered by fixed rules and therefore unwilling to assume discretion, is a subject that might profitably receive a scholarly review of the development of the law, and the present tendencies of the banking world. Debatable problems have been discussed by the highest State and Federal courts, and, at times, with conflicting opinions. With the various decisions in state courts, the questions pressing for solution deserve deliberate consideration of legislators. For instance, shall combinations of capital be advocated with full regard to the material gain to a bank, as well as benefit to the community? It is necessary for counsel to consult local laws as well as the federal statutes, for the practitioner must advise respecting the comparative advantages of state or national organization; as also the right to maintain branch banks, which may be permissible under a state law, but not under federal organization. And counsel may be requested to express opinion as to a possible lawful method of avoiding existing barriers which may confront expansion.

The second volume of the present edition in Part II contains the National Banking Laws, The Federal Reserve Act and a Table of Changes in the National Banking Laws made by the McFadden-Pepper Act of 1927; and in the appendix, the Negotiable Instruments Law which sought to establish uniformity on that subject. There is, however, no complete discussion of the Federal Reserve Act, which has involved many new questions since its adoption in 1913.

It is convenient to find the various statutes and changes in legislation in a single work, but it is obvious that one or more of these statutes may justify a volume devoted alone to the one subject.

The lights and shadows of the many decisions in the courts are not treated at any length; most of them may be found cited in the notes, but without comment on the particular point decided. In recent years there have been numerous decisions arising out of the attitude of banks respecting documents presented under commercial letters of credit, and that is a subject which might justify a separate work. The present edition, however, seems to contain no statement of the law which is not more comprehensively covered in digests citing the authorities. These helpful guides are necessary tools in the office of a busy lawyer, but an authoritative work on banking may yet be furnished in a text-book that will enjoy the same favor as the original work of Mr. Morse.

The present volumes add little to the 3rd edition of 1888 or the 4th edition of 1903, prepared by Frank Parsons; or indeed to the 5th edition of 1917 by James N. Carter, which purports to bring citations of cases to that date.

EDGAR J. NATHAN.

New York City.

Elements of Constitutional Law. By Ben Albert Arneson. New York and London. Harper & Bros. 1928. Pp. X, 359.—Professor Arneson has undertaken in this volume a brief and non-technical summary of the law of the Constitution, principally for the use of undergraduates in college courses, but also in the hope that it may prove useful to members of the public who are stirred by curiosity as to the nature and functioning of their state and national governments. It is not possible, of course, to deal exhaustively with the subject in 339 pages, and the author does not claim to have done so, but one feels that there is real insufficiency in the space devoted to Powers of the Federal Government in chapter four, and to How Personal Rights are Safeguarded in chapter eight.

The most satisfactory chapters in Professor Arneson's book are those on Interstate Commerce and Its Regulation, Police Power and Due Process, and Equal Protection of the Law. The chapter discussing How Contracts Are Safeguarded is less satisfactory, and that dealing with Citizenship and Suffrage seems inadequate and somewhat confused.

The chapter last referred to opens with the statement that "State citizenship is of comparatively little importance to the average American," disregarding the importance of the privileges and immunities clause of the Fourth Article, and the diverse citizenship clause of the Third Article. In the same chapter (p. 294), it is said that "the word *nationals* is used to designate the status of those who are neither citizens nor aliens." I have supposed it was used to describe all those who are not aliens. It is, therefore, a term inclusive of, though broader than, citizens. On the same page, in speaking of children born within the United States to foreign parents it is said to be "their constitutional right, however, under the Fourteenth Amendment, to be considered as natural-born American citizens, but they are not compelled to be so considered." But certainly there is no choice in the matter. By the Fourteenth Amendment such persons are given no alternative, but are citizens of the United States. Their right at a later day to renounce that citizenship may or may not be given by treaty or statute.

In the chapter on The Courts and the Constitution, Marbury v. Madison is spoken of as the case in which the "doctrine of judicial review was first applied" (p. 46). This statement ignores, as does the rest of the discussion of the subject, the earlier state decisions to the same effect. In commenting in the fifth chapter upon Luther v. Borden (p. 95), dealing with the situation where a revolutionary government was sought to be set up in Rhode Island, and the President recognized the old government, there is this comment: "As a matter of historical interest it ought to be added that the new government was later recognized by the federal authorities." It was not the Dorr government which was later recognized, but one set up under a new constitution proposed by the old recognized government. The summary at the end of the chapter (p. 103), of the law of the "Insular Cases," would not, I feel sure, be recognized by the Supreme Court.

The assertion that "the protection against arbitrary federal bankruptcy legislation is the same as that given by the contract clause against state action,"

would seem not to accord with the decision in Hanover National Bank v. Moyses, 186 U. S. 181. The statement on page 230 that "no state law passed under the police power may impair the obligation of a contract," should rather be "no state law passed under the police power does impair the obligation of a contract in the constitutional sense," since all contracts are made subject to the police power. In fact, the modern development of the police power as a limitation upon the contract clause is not developed by Professor Arneson (p. 150 *et. seq.*)

In dealing with federal taxation, the author fails to note the right of the United States to tax a state engaging in business (South Carolina v. United States, 199 U. S. 437), and in discussing Race Discrimination p. 274 *et seq.*) he omits to call the reader's attention to Nixon v. Herndon, 273 U. S. 536, in which a state's power to exclude negroes from primary elections was denied. Also in connection with extradition no mention is made of the right to try a fugitive from justice who has been kidnapped in a foreign country and brought home.

CHARLES K. BURDICK.

Cornell Law School, Ithaca, New York.

Jurisdiction in Marginal Seas with Special Reference to Smuggling, by William E. Masterson. New York: The MacMillan Company, 1929. Pp. XXVI and 423.—The spectacular sinking of the "I'm Alone" far out in the Gulf of Mexico by the Coast Guard Cutter "DEXTER" in March focused international interest on this twilight zone of international law. Any determination of rights involved requires a knowledge of the origin and growth of jurisdiction in marginal waters. This subject is clarified by Professor William E. Masterson's new book *"Jurisdiction in Marginal Seas."* The scope of the study is limited to jurisdiction over foreign smuggling craft bent on breaking customs barriers. The discussion is further confined to the evolution of the law in Great Britain and the United States. The subject is logically analyzed as follows:

1. The Development of the English Law.
2. The Law of the British Empire.
3. The Development of the Law of the United States.
4. Diplomatic Correspondence, Treaties, International Arbitrations, etc.
5. Conclusions.

England struggled against smuggling as early as the 13th Century. In 1678 the Board of Customs instructed the Collector at Stockton-on-Tees "That they be very vigilant that French wines be not landed under ye name of other wines." The Lord High Admiral appointed certain armed sloops to cruise on the coasts of England and Ireland to seize all ships engaged in smuggling. No jurisdictional limit was fixed over smuggling craft as in the 17th century England maintained jurisdiction throughout the "English Seas." Later, in 1736, the first limitation of four leagues was imposed by legislation. The Earl of Illay explained in the House of Lords the origin and necessity of "hovering laws" and their sanction by international law. In spite of aggressive action by Parliament smuggling flourished and enjoyed its golden age from 1802 to 1825. So threatening and pervasive did the evil become that Parliament swept aside restrictions and extended jurisdiction in certain cases to one hundred leagues. Successive statutes were passed in a vain effort to keep abreast of new smuggling methods and devices. The result was legislative duplication and confusion followed by simplified legislation in 1825. This new legislation marked the beginning of the decline of English smuggling resulting in practical extinguishment in 1851. It is noteworthy that Section 181 of the Act of 1876 provided for the firing into any vessel liable to seizure and examination which shall not bring to when required to do so. Many of the sections of the Act of 1876 are applicable to aircraft by the Air Navigation (Consolidation) Order of 1923.

The laws of the British Empire as reflected in the enactments of the Dominions and the Colonies are not uniform. In New Zealand under the Act of 1913 authority was given to fire into a vessel where not brought to as required as well as to board any ship "within or without the territorial waters." In 1922, however, amendments limited boarding and searching to "territorial waters."

The Union of South Africa passed a Customs Act in 1913 providing that an officer may board "any ship arriving at any port in the Union, or being within one marine league of the coast thereof."

Professor Masterson divides the development of the law of the United States into two periods, 1775-1920 and 1920-1928. The smuggling going on during the early history of the country evoked legislation requiring masters of all vessels bound for the United States to produce manifests for all cargoes upon arrival within four leagues of the coast and authorizing the seizure of any hovering "slaver."

After 1920 smuggling increased with the arrival of the "Rum Fleet." The rum vessels were seized and forfeited under the old Four-League Statutes, the National Prohibition Act, and the Tariff Act of 1922. The author carefully analyzes the long line of decisions differentiating the cases of unloading vessels within four leagues, but beyond one league using her own small boats or the boats of others, the vessel within four leagues without a manifest, and the vessel selling her wares just inside the four league limit. The seizures of American vessels on the high seas are reviewed, the decisions demonstrating that an American vessel operated "in violation of the laws of the United States can be apprehended on the high seas as well as within the territorial waters."

The diplomatic discussions and prohibitive legislation culminated in the Rum Treaties of 1924-1928. Although international law did not bar the seizure of vessels by the United States under its hovering laws, yet the treaties helped by permitting seizures at greater distances and reducing the probability of friction and protest. Practically the treaties have wiped out much of the smuggling from the sea by pushing the remnant of "Rum Row" out beyond the one hour's cruising distance. The court decisions under the treaties are reviewed.

A broad distinction has evolved between general jurisdiction in marginal seas and a more extensive jurisdiction for fiscal purposes. This basic distinction has been recognized by publicists and in draft conventions. The author grounds this special jurisdiction on the theory of interests—such as revenue.

International legislation is recognized as possible fixing jurisdiction over marginal waters beyond the three-mile limit for the purpose of protecting national fiscal interests. This possibility arises from replies received from various governments to a questionnaire on territorial waters sent out by the Committee of

Experts for the Progressive Codification of International Law.

The book is fully annotated, carefully indexed, and contains a table of cases, and a chronological list of English and American statutes. Professor Masterson is to be congratulated on basing his study on original sources. International law is a field in which too many writers have contented themselves with an empty repetition of the hearsay and speculations of others. The author's thorough research was sponsored by the Bureau of International Research of Harvard University and Radcliffe College. This timely book represents not only a scholarly contribution to the literature of this field but a source of practical help to public officers charged with the protection of national interests.

HOWARD S. LEROY.

Lectures on Legal Topics. Volume V, 1923-1924. Delivered at the House of the Association of the Bar of the City of New York. New York: The MacMillan Company. Pp. VIII, 485. $3.50. — Beginning October 18, 1923, and proceeding through that winter, The Association of the Bar of the City of New York continued its course of weekly lectures. In February, 1927, they were collected and in August, 1928, printed. The reviewer admits catching the spirit of leisurely progress.

The speakers, nineteen in number, ranged capriciously over the hills of wisdom. It is interesting to observe how leaders of our profession continue to find so many subjects of paramount importance. Justice Marks of the Municipal Court of the City of New York makes a plea for a better appreciation of the human side of his very busy court. Professor Walter W. Cook, then at Yale and now of Johns Hopkins, tells of the utility of jurisprudence in the solution of legal problems and bids us all to reform our concepts as well as our terminology—a counsel of perfection which may be as difficult to accept as the advice of the physical culture instructor who tells the man of sixty that he never learned to breathe or stand as he should. Mr. Paul D. Cravath brings the problem of reparations up to November, 1923, and awakens reminiscence and compels prophecy. Members, past and present, of the Court of Appeals discuss from experience what their work has meant to them. Professor Borchard thought the prospect of declaratory judgments bright. Two successive evenings were taken up with the discussion of motions and orders under the New York Code. There was advice to the young on "How Not to Try a Case."

It would profit a man to read and re-read the back numbers of the American Bar Association Journal and the other excellent law reviews published in this country and abroad. He would see what able men have thought and said about the problems that beset the scholar. He might feel the waves of legal philosophy and gain an opinion as to the permanence and force of the work of our profession. To a reader so blessed with time for rumination and contemplation, the present volume will be a boon. For others, days are busy, courts voluble, vacations desirable, new ideas press, and life is short. They read Session Laws rather than the Year Books. For them five years are as five hundred.

MITCHELL D. FOLLANSBEE.

Leading Articles in Current Legal Periodicals

American Journal of International Law, April (Washington, D. C.)—Arbitration and Conciliation in Pan America, by James Oliver Murdock; The International Telegraph Conference of Brussels, by Irvin Stewart; The Chicago Drainage Canal and St. Lawrence Development, by J. Q. Dealey, Jr.; The "Injunction of Secrecy" with Respect to American Treaties, by Manley O. Hudson; The Soviet Security Treaties, by Malbone W. Graham; The Sinking of the "I'm Alone," by William C. Dennis.

Southern California Law Review, April (Los Angeles, Cal.)—Joinder of Parties in the Light of Recent Statutory Changes, by Leon R. Yankwich; Need of Unified Law for Surface and Underground Water, by Samuel C. Wiel.

Georgetown Law Journal, February (Washington, D. C.)—Equity Prior to the Chancellor's Court, by William F. Walsh; The Origin of the Patent and Copyright Clause of the Constitution, by Karl Fenning; James Madison and The Federal City, by Frank Sprigg Perry; The First Legal Execution for Crime in Upper Canada, by William Renwick Riddell.

North Carolina Law Review, April (Chapel Hill, N. C.)—The Recovery of Damages for Loss of Expected Profits, by Charles T. McCormick; Restraint of Trade in North Carolina, by M. S. Breckenridge; The Supreme Court and Commerce by Motor Vehicle, by Charles P. Light, Jr.

University of Pennsylvania Law Review, April (Philadelphia)—Some Observations on the Law of Evidence—Consciousness of Guilt, by Robert M. Hutchins; Donald Slesinger; Assistance or Manual Aid in Signing or Affixing Mark to Wills in Pennsylvania, by Albert Smith Faught; Post-Incorporation Subscriptions and Other Contracts to Create Shares at a Future Time, by Alexander Hamilton Frey.

The Lawyer and Banker and Central Law Journal, March-April (New Orleans, La.)—How Titles are Affected in Subdivision Development Work, by Harvey O'Higgins; Reapportionment, by Ray E. Lane; 14th Amendment and the Right to Hold Office, by Frederick G. Bromberg; Presidential Law-making Powers; Proceedings Affecting Title; Legality of the Trial of Jesus, by Dr. S. Srinivasa.

Harvard Law Review, April (Cambridge, Mass.)—Misrepresentation as Deceit, Negligence, or Warranty, by Francis H. Bohlen; Compensation of Bankers and Promoters Through Stock Profits, by A. A. Berle, Jr.; Labor Injunctions and Federal Legislation, by Felix Frankfurter and Nathan Greene.

Canadian Bar Review, March (Toronto)—Copyright in Canada, by E. J. Waterson; Strangers in the Jury Room, by V. L. Parsons; Police Efficiency, by E. Coatsworth; Questioning Prisoners in Custody, by A. E. Popple.

Virginia Law Review, March (Charlottesville, Va.)—Some Recent Tendencies in the "Law of Insurance," by Hugh J. Fegan; The Doctrine of Sovereignty under the United States Constitution, by Hugh Evander Willis.

Michigan Law Review, April (Ann Arbor, Mich.)—The United States and the League of Nations, by Clarence A. Berdahl; The Paradoxes of Legal Science; A Review, by Rousseau A. Burch; The Fifteenth Century—The Dark Age in Legal History, by Joseph F. Francis.

Journal of Criminal Law and Criminology, February (Chicago)—The Use of the Injunction to Destroy Commercialized Prostitution, by Robert McCurdy; The History of the Movement to Establish a State Reformatory for Women in Connecticut, by Helen Worthington Rogers; The "Kindly Scot" and his "Ain La'," by William Renwick Riddell; The King's Evil and High Treason, by William Renwick Riddell; Some Old Scottish Criminal Law, by William Renwick Riddell; Meden Again, by William Renwick Riddell; The Judges and the Legislature, by Newman Levy; Amnesia from a Medicolegal Standpoint, by Alfred Gordon; Impulsive Neuroses and Crime. A Critical Review, by Ben Karpman, M. D., A Study of the Relationship Between Intelligence and Crime, by Milton Hyland Erickson.

Minnesota Law Review, April (Minneapolis, Minn.)—Due Process in Valuation of Local Utilities, by Frederick K. Beutel; The Effect of an Unconstitutional Statute in the Law of Public Officers: Effect on Official Status, by Oliver P. Field.

CIVIL LAW THEORY AND COMMON LAW PRACTICE

Would Establishment of Codes in This Country Result in Obsolescence of Common Law Theories as to Proper Factors in Judicial Decision and Eventual Triumph of Civil Law Ideas? What Happened Here to a Supposedly Complete Code Purporting to Lay Down Principles Rather Than Mere Rules

By John Barker Waite
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IN Judge Henry's thought provoking discussion of the effect of precedent in Civil Law systems as compared with its use in Common Law courts,[1] he suggests that *jurisprudence constante* is more to be desired than *stare decisis*. "But," he says, "the Civil Law attitude of courts can not be looked for in this country until there is developed some source of law other than precedents; there is a well-nigh insuperable difficulty in the way of the Common Law giving up even in a measure its adherence to precedents, good, bad and indifferent. It lies in the absence of codes or any official source of the law."

Could that Civil Law attitude be expected, one wonders, even should we establish the presence of codes as official sources of the law? Would common law theories as to the proper factors in judicial decision soon be obsolescent and the ideas of the civil law eventually prevail, or would the clash of *stare decisis* with legislative formulation produce a hybrid procedure with its explanatory philosophy? We know now from experience that single statutes have consistently gone down to defeat before the common law judical methods. Even the New York code of civil procedure failed to establish the legislative intent. Such instances, however, can logically be rejected by an advocate of civil law principles as not indicative of what would happen to a code completely replacing the common law, because they have been dealing only with single, or isolated, or intrusive statutes, and there is a "difference between civil law and common law thinking as to (such) statutes. . . . With us a statute, unless declaratory of the common law, gives only a rule. Hence statutes in derogation of the common law are to be construed strictly. Hence Lord Campbell's Act is applied as if it were something anomalous and exceptional, although it is as universal in common law jurisdictions as any legal institution can be."[2]

It is interesting, therefore, to note what happens to an intendedly complete and comprehensive code, purporting to lay down principles rather than mere rules, in a field so free from common law decisions that the legislation could not in any reasonable sense be said to derogate the common law, or to be intrusive of it.

It is a trite law—or perhaps more accurately, commonplace thought—that the monopolistic rights of inventors are created by statute and depend wholly upon formal legislation. At common law, "So long as the originator of the naked idea keeps it to himself . . . it is his exclusive property, but it ceases to be his own when he permits it to pass from him. Ideas of this sort, in their relation to property may be likened to the interest which a person may obtain in bees and birds, and fish in running streams, which are conspicuous instances of *ferae naturae*. If the claimant keeps them on his own premises they become his qualified property and absolutely his so long as they do not escape. But if he permits them to go he can not follow them."[3] Hence, "the right of an inventor to a patent depends entirely upon the provisions of positive law."[4] In other words, the legislation giving to inventors the privilege of securing a patent and the enjoyment of monopolistic rights thereunder, creates something which simply did not exist at common law. The provisions of the legislation are not in conflict with common law decisions, nor did the common law ever repudiate its fundamental principle. On the contrary, monopolies particularly granted for new and useful inventions were favored by the common law ideals.[5] In this legislation, therefore, we have what purports to be a complete code of law covering the whole field and not in derogation of preexisting judicial decisions.

Here, then is the code, the "official source" of law, which Judge Henry indicates as essential to Civil Law methods. Because it creates rights which the common law approved but had not itself established, it stands in a sense outside of the body of the common law. Moreover, it purports to cover the field of rights created by it and to be complete in itself. If our judicial philosophy were inclined toward sympathy with the Civil Law attitude, receptive of Civil Law methods when practicable, one might expect to find it demonstrated here. In fact, however, one discovers the common law practice of construction, interpretation and even alteration applied by the courts to the code of patent law.

Turning to the Congressional enactments one finds that "any person who has invented or discovered" certain things may have a patent if his invention was not known already by others and if he can swear that

1. 15 Am. Bar Assn. Jr. 11, Jan., 1929.

2. Quoted from the clarifying discussion by Dean Pound of "The Theory of Judicial Decision," 36 Harv. L. Rev. 641, 647. For a discussion of the "free law" theory, "that *absolutely all* rules which a law-giver publishes should be viewed as provisional and not really authritative standards, that then the judge should make his decision according to *free* discussion," see Stammler, "Legislation and Judicial Decision," 23 Mich. L. Rev. 362, 374.

3. Bristol v. E. L. A. Soc., 52 Hun. 161, 5 N. Y. S. 131, aff'd. 132 N. Y. 264. As to the modicum of protection given by equity to an inventor, see e. g., Tabor v. Hoffman, 118 N. Y. 30; McClary v. Hubbard, 97 Vt. 222, 122 Atl. 469; O. & W. Thum Co. v. Tloczynski, 114 Mich. 149.

4. 1 Robinson on Patents, sec. 66. "Congress has power to promote the progress of science and useful arts, by securing for limited times to inventors the exclusive right to their respective discoveries. This constitutional law is the foundation of all the patent laws of the United States." Walker on Patents, 5th ed. p. 1.

5. See Waite, Patent Law, p. 2.

he believes himself to be the "original and first" inventor. (Other statutory limitations will be referred to later.) Obviously, then, when any person seeks a patent, the first question is whether he has really invented something and if so, whether he is the first and original inventor. To be an "inventor" within the meaning of the statute it is not essential that one have produced an actual machine or other concrete, tangible embodiment of the idea. The idea of means itself, so definite and precise that it can be so embodied is the invention.

When two applicants assert rights in respect to the same alleged invention, the controversy raises difficult problems of proof on questions of fact which have no bearing at all on the legal aspect of what constitutes "invention." Thus in the *Bell Telephone* case, which occupies the entire 126th volume of United States reports and in the *Barbed Wire Patent* case[6] no question was involved of the *legal* sufficiency of the alleged knowledge and its demonstration to constitute invention; what raised the difficulties of controversy was whether the alleged knowledge did really exist. In the *Telephone* case the testimony of nearly 200 witnesses as to the existence of alleged prior invention was discounted by the court, not on the theory that what was asserted would not have constituted invention, but that if the knowledge had in fact *existed* it would have manifested itself in tangible form.

As evidence bearing upon such questions of fact, many circumstances are important which do not logically relate to the legal questions of invention. The fact, for example, that the alleged prior knowedge has actually been embodied in tangible form indicates its existence more emphatically than if it has never been embodied. Similarly, the fact that the alleged prior knowedge has actually been put to use and has accomplished the same results as the applicant's invention tends to demonstrate, more impressively than any witness' mere recollections, that the applicant's idea was previously known. And if the previous device was abandoned, its use discontinued, there rises a fair inference that it did not work, did not do what the applicant's device will do, and therefore did not in truth embody precisely the same idea as the applicant's device. In short, "embodiment in tangible form," "reduction to practice," "use," "abandonment of experiments," and all such similar circumstances are merely evidence as to the *existence* or *identity* of alleged prior knowledge and have no logical connection with the legal nature and requisites of "invention."

Neither actual use nor even embodiment is essential to the completion of an invention. The invention exists, though its existence may not be practically provable, when an idea of definite, concrete, usable means to an end has been conceived and so precisely formulated that a tangible embodiment could be made and put into use by competent workmen possessing ordinary mechanical skill. "The invention itself is an intellectual process or operation. . . . The invention may be consummated and perfect and may be susceptible of complete description in words, a month, or even a year before it can be embodied in any visible form, machine, or composition of matter. It might take a year to construct a steamboat after the inventor had completely mastered all the details of his invention, and had fully explained them to all the various artisans whom he might employ to construct the different parts of the machinery. And yet from those very details and explanations another ingenious mechanic might be able to construct the whole apparatus. . . . In short, such conversations and declarations, coupled with a description of the nature and objects of the invention are . . . legitimate evidence that the invention was then known and claimed by him, and thus its origin may be fixed at least as early as that period."[7] Many decisions apparently in conflict with this proposition are demonstrably only loosely phrased determinations that the *evidence of the existence* of a definite, embodiable and usable idea at the date set is insufficient, or that whatever idea did then exist *was not identical* with the idea later asserted.[8] This confusion of ideas between legal existence and proof of that existence, is quite obvious in such arguments as that, "Simple inventions may be completed by drawings or disclosure which sufficiently describe the invention, while complicated inventions require for their completion actual reduction to practice."[9] Many a patent has been granted, and subsequently upheld in the courts, upon written description and drawings only, long before any tangible embodiment has been constructed or any actual use of the idea been made. It follows therefore, that an inventor is an inventor, within the meaning ascribed by the courts to the term as used in the statute, even though he may not yet have embodied his invention in tangible form or otherwise have put it to actual use.

Assuming an invention to have been made, and to be the original and first one made, the inventor has a statutory right to a patent unless he has lost that right. The statute declares that he does lose his right to a patent (1) if his invention be described in any printed publication more than two years prior to his application for a patent, (2) if it has been in public use or on sale in this country for more than two years prior to his application, (3) if he is proved to have abandoned it, or (4) if he applies for a foreign patent more than the allowed time before his application in this country. Our statute does not require that practical use be made of the invention either before or after the application for patent. The legislation, as such, gives the original and first inventor a right to a patent unless he had lost it in one of the four ways stated; there are no other exceptions stated. On the *expressio unius* principle one might assume that these expressed grounds of loss of right are the only ones intended by the legislature.

Abandonment, the third ground stated above, "is like the dedication of a public way or other easement, and may be proved in the same manner by evidence of some acts inconsistent with the retention of exclusive property in himself."[10] The fact of abandonment may be proved by any sort of evidence logically indicating such an intent.[11] The inventor may announce expressly its availability by the general public, or simply acquiesce in so general a use that no other inference is reasonable, or he may indicate his abandonment in other ways.[12] But in general it is agreed that a positive effort to keep his invention to himself does

6. 143 U. S. 275.

7. Phila. and Reading R. R. Co. v. Stimpson, 14 Peters 448. So also Telephone Cases, 126 U. S. at p. 535.

8. See, e. g. Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481.

9. Automatic Weighing Machine Co. v. Pneumatic Scale Corp., 166 Fed. 288 (argument by counsel).

10. Babcock v. Degener, Fed. cas. No. 698; W. W. Sly Mfg. Co. v. Russell, 189 Fed. 61.

11. Kendall v. Windsor, 21 How. 322; U. S. Rifle and Cartridge Co. v. Whitney Arms Co., 118 U. S. 22.

12. For a discussion of decided cases see Waite, Patent Law, p. 154.

not indicate any intent to abandon it to the public or to forego his right to a patent.[13]

With this background of legislation, the case of *Automatic Weighing Machine Co. v. Pneumatic Scale Corp.*[14] came before the court. One Thomas asserted that he had made an invention for which he applied for a patent in December, 1896. The date of his application was assumed to be the date of his invention. (It does not appear that Thomas had at that time actually used or embodied his idea.) One Watson claimed to have conceived the invention in question and to have illustrated it by a drawing and disclosed it to others so early as January, 1896, eleven months before Thomas' invention. Watson's *application*, however, was not filed until some months after Thomas' application.

In this situation the court might have found that Watson's allegation of fact was not true—that he had not definitely conceived the identical idea of means in January. But the decision proceeds on the assumption that the allegation was true and that Watson's conception of the particular idea did in truth antedate Thomas'. Undoubtedly, therefore, Watson was the original and first conceptor of the precise idea for which both were seeking a patent.

There was no evidence that Watson ever intended to "abandon" his right to a patent. It is not even suggested in the opinion, nor does the court in any way intimate abandonment as a basis of decision. Neither had the invention been described in print, nor been in public use nor on sale, nor had a foreign patent been applied for.

Yet the court held that Watson had lost his right to a patent.

The decision was not put upon a statutory provision, but upon a rule of *judicial precedent* that an inventor will not be permitted to carry the date of his invention back to the time of his drawings and disclosure *unless he has used "reasonable diligence" in applying for a patent,* or in some other way "reducing it to practice."

In occasional discussion of similar situations it is suggested that Watson's inability to get a patent was not because he had lost his right thereto, but because he never had a right; that is, that he was not an "inventor", and had no "invention" which could be patented until he had "reduced his idea to practice" in some such way as embodiment, use, or at least application for a patent.[15] Such epithetical justification for the decision is negatived, however, in the opinion itself by the proviso that *if he had been diligent* in applying, he could have carried the date of invention back to the time of his drawings and disclosure.[16]

But even had the opinion not negatived any such fallacious rationalization, the ground would be cut from under it by *Mason v. Hepburn.*[17] Here Mason asserted that in 1887 he conceived the idea of a certain improvement in magazine rifles, that he had made a working drawing of the device and that one embodiment was actually made and tried out. He demonstrated it to one or two employees of the Winchester Arms Company and then stored it in the model room of the company, where it was not available to public knowledge. Hepburn conceived the same idea in 1894 and both he and Mason applied for a patent. Mason's application was refused.

The court specifically conceded the facts as stated; the case was not one of insufficient proof of the date of Mason's invention or of its identity with Hepburn's. An argument that it had not been "reduced to practice" failed; "in our opinion," said the court, "the reduction to practice of the clip was accomplished by its perfect construction and attachment to a gun apparently completed and ready for sale and use." The court also expressly negatived the suggestion that Mason's invention had been "forgotten" and had become a "lost art." Moreover, the court declared that the invention "not having been given or abandoned to public use," there was nothing in the mere lapse of time to prevent Mason from receiving a patent. The other statutory grounds for loss of right to a patent were not even suggested.

Here was, then, a complete invention—complete in the sense not only of definite conception, but of embodiment and "reduction to practice" as well. It was not known or used by others prior to Mason's invention of it; it had not been in public use or on sale; no foreign patent had been applied for; it had not been abandoned. Yet Mason was held to have lost his right to a patent on the ground, not expressed in the statute, that he had deliberately withheld knowledge of his invention from the public other than those few persons to whom he had revealed it.

The same reason was used by the Circuit Court of Appeals, in *Macbeth-Evans Glass Co. v. General Electric Co.*,[18] for holding that an unquestioned original and first inventor had lost his right to a patent. Here he had not only embodied his idea, but had used it continuously for nine years. It was a *secret* use, however, and the court assumed both that the invention had not been in public use and that the inventor had evinced no intent to abandon it. Again, also, none of the other statutory bases for loss of right applied. But, said the court, the inventor's conduct "certainly did contemplate an indefinite delay in disclosure of the invention and a practical and substantial enlargement of any period of monopoly recognized by statute. Can it be doubted that this was opposed to a declared and subsisting public policy?"

On this ground of public policy, then, a ground not stated in the statute, the court held the right to have been forfeited.

The practical wisdom of these decisions is apparent and appears not to be questioned. But can it be denied that they have added to the legislation, upon which patent rights are supposed to depend, a *fifth* provision for loss of right to a patent.

These decisions, in holding the right to a patent to have been lost, merely add to the law a condition of "due diligence" not expressed in the legislation. Perhaps it might be said that they did not alter the legislation, but merely gave effect to causes which, while not expressed, were implicit in the statute. But in two of the cases the court went further and actually changed the statute as enacted.

The law as enacted by Congress is, that "any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter . . . *not known or used by others . . . before his invention* . . . may . . . obtain a patent therefor." "The fundamental rule is that the patentee must be the

13. See, e. g. Bates v. Coe, 98 U. S. 31; Parks v. Booth, 102 U. S. 96.

14. 166 Fed. 288 (1909).

15. E. g. Milburn Co. v. Davis etc. Co., 270 U. S. 390.

16. At that date, when the drawings and disclosure were made, he either had or had not invented the idea. Subsequent diligence could not affect the character of what he had then accomplished. If subsequent diligence could have entitled him to a patent for what he had then done, he must necessarily have then invented something.

17. 13 App. D. C. 86 (1898).

18. 246 Fed. 695 (1917).

first inventor"[19] But note what happened in the *Automatic Weighing Machine* case. Watson, as has been said, conceived his idea, illustrated it by a drawing and disclosed it to others in January 1896. Thomas conceived the same idea eleven months later and applied for a patent. The court held that Watson by his delay had lost his right to a patent. Then it declared that Thomas, *despite the fact that his invention was known to others at the time he conceived it*, was entitled to a patent.

On this point, Mr. Walker says, "it is clear that to use a model or drawing is not to use the machine or manufacture which it represents; and it is equally obvious that to know a drawing or a model is not the same thing as knowing the article which that drawing or model more or less imperfectly pictures to the idea."[20] This is rephrased in a judicial opinion as, "It is clear, as pointed out by Mr. Walker, that knowledge of a model of a machine is not knowledge of the machine itself any more than knowledge of a model of Brooklyn Bridge is knowledge of that structure."[21]

This is irrefutably true, of course, but the syllogism which they build upon this proposition is afflicted with an undistributed middle. Knowledge of the drawing or description is not knowledge of the tangible thing; but knowledge of the drawing and description *is* knowledge of the *idea* which they represent. And the invention is the idea, not the tangible embodiment of it. As has already been pointed out, a tangible embodiment, or actual use, or something else of the sort may be found necessary as proof of the existence of a certain idea. But it is perfectly obvious that in the usual case the precise details of an idea of means can be presented in drawings and parole description. If the *idea* in all its essential details is thus made known, the *invention* is known, whether it has ever been embodied or utilized or not. That it has never been used may be evidence that it could not be used and therefore is not identical with a later idea which can be used. But if the first idea as made known by the drawing and description is in fact identical with that which is later conceived, it is indisputable that the later conceived idea has already been known to those who understood the earlier presentation of it. That the invention is the idea rather than the embodiment is implicit in scores of decisions, not to mention the Patent Office practice of issuing patents for inventions which have never been actually used or embodied. Mr. Walker and the courts fully concede that to know a drawing or a description *is* to know the invention revealed thereby, if the drawing and description be filed in the Patent Office, or printed in some publication.[22]

In the *Automatic Weighing Machine Co.* case, the court assumes that Thomas' later conception was the same as Watson's earlier one. Thomas' invention therefore was already known to Watson and to those others to whom the court says he had disclosed it. Nevertheless, Thomas got a patent, *for an invention known to others before his own invention* thereof.

Mr. Justice Holmes recently explained the granting of a patent to the second inventor under such circumstances by saying, "The patent law authorizes a person who has invented an improvement like the present, 'not known or used by others in this country, before his invention', etc., to obtain a patent for it. Among the defenses to a suit for infringement the fourth specified by the statute is that the patentee 'was not the original and first inventor or discoverer of any material and substantial part of the thing patented'. Taking these words in their natural sense as they would be read by the common man obviously one is not the first inventor if somebody else has made a complete and adequate description of the thing claimed before the earliest moment to which the alleged inventor can carry his invention back. But the words can not be taken quite so simply. In view of the gain to the public that the patent laws mean to secure we assume for purposes of decision that it would have been no bar to Whitford's patent if Clifford had written out his description and kept it in his portfolio uncommunicated to anyone."[23] He then continues by saying that an inventor is not an inventor, (i. e., *ceases* to be an inventor) if he neglects to use due diligence to reduce his idea to practice.

An easier basis of decision in such a case as Mr. Justice Holmes suggests would have been that on which the *Telephone* and *Barbed Wire Patent* cases turned, namely that Clifford's assertion, that he had written his description when he said he did, was not sufficient proof of the fact to justify invalidating Whitford's patent. The obvious fallacy in the other proposition is in the conclusion that because no one else is entitled to a patent, no one else has already known the idea. That conclusion is a *non sequitur*.

But at any rate, not even an epithetical or definitive pretense that the earlier invention was not completely "known" can be set up to explain *Mason v. Hepburn*. In that case Mason had actually made a clip embodying his idea and it had been seen by "several persons." Nor had this knowledge been "forgotten." "The clip," said the court, "had not been lost or destroyed or even removed from the gun. It was where the inventor could readily put his hand on it. Reminded simply of its existence or possible value by the publication of the patent to Hepburn, he required no assistance from the specification of that patent to aid him in again making and using it."

Here, beyond even pretense, Hepburn's invention was already known by others. Yet he was held entitled to a patent—an undeniable disregard of the legislation which is supposed to be the only basis of a patent monopoly.[24]

The explanation by the court itself, like that of Mr. Justice Holmes in the other case, is public policy. "Considering the paramount interest of the public in its bearing upon the question as presented here, we think it imperatively demands that a subsequent inventor (sic) of a new and useful manufacture or improvement who has diligently pursued his labors to the procurement of a patent in good faith and without any knowledge of the preceeding discoveries of another, shall, as against that other, who has deliberately

(*Continued on page 371*)

19. Milburn Co. v. Davis, 270 U. S. 390.

20. Walker, Patents, 5th ed. p. 76. But compare his own statement that drawings may negative novelty, p. 71 ff.

21. Am. Writing Mach. Co. v. Wagner Typewriter Co., 151 Fed. 576.

22. Watson's invention seems to have been known not only to himself but to several other persons as well—thus it was known "to others" than Thomas. As a matter of dictum, the Supreme Court once said, "The prior knowledge and use by a single person is sufficient. The number is immaterial." Coffin v. Ogden, 18 Wall. 120 (in fact five persons knew the invention). See also, Twentieth Century Co. v. Loew Mfg. Co., 243 Fed. 373, 378. In Bannerman v. Sanford, 99 Fed. 294, construction of a model, known to but one person, was held to show prior knowledge by others.

23. Milburn Co. v. Davis etc., Co., 170 U. S. 390.

24. As the case arose out of interference proceedings, the actual *validity* of the patent was not involved, except as it would have been a futile thing for the court to award Hepburn an admittedly worthless patent.

LAS SIETE PARTIDAS IN FULL ENGLISH DRESS

Publication Under the Auspices of the Comparative Law Bureau of Complete Translation Made by Dr. S. P. Scott Many Years Ago — Obstacles Confronting Translator of Ancient Text—Its History, Sources, Authorship, Character and Place in Legal World*

By Charles Sumner Lobingier

At last the Comparative Law Bureau of the American Bar Association is able to put forth a complete English translation of the learned Alfonso's mediæval code. For more than a century, English readers of it have been dependent upon the translation of Moreau Lislet and Carleton, which was never intended to be complete[1] and has long been out of print. Thanks to the patience and industry of Dr. S. P. Scott we have the entire work in English, and thanks to the generosity and vision of Mr. William Kix Miller and the Commerce Clearing House, of which he is the head, that work will soon be accessible to all readers of English.

There is no task more thankless than that of the translator. A judicial experience of many years in countries where court interpreters were regularly employed, long since convinced the writer that no two translations into another language are exactly alike. The shades of meaning in all languages are so numerous and varied that the most expert of linguists often differ among themselves. When to that source of divergence is added the difficulty of translating from a modern language in a stage as remote from us as the English of Bracton's day, we can form some estimate of the obstacles encountered by Dr. Scott in this undertaking. Only a scholar, versed in both law and language of Spain and of America, is qualified to pass on his work; and it is hardly necessary to add that there are none too many such in the United States.

Now that we have this famous work entirely in English, after so much labor and delay, we must see that it circulates and is read. It should promote that purpose to give the reader a general idea of it before asking him to plunge *in medias res*. Let us, therefore, by way of preliminary, try to visualize its background by inquiring briefly into its history, sources, authorship, character and place in the legal world and finally by taking a bird's eye view of its arrangement and contents.

Landmarks of Spanish Law { **Civil Code, 1889.** / **Las Siete Partidas, 1263.** / **Forum Judicum, 652 (ca.)**

Las Siete Partidas constitute one of the outstanding landmarks of Spanish, as indeed of world, law and occupy an unique place in its evolution. For they stand midway between the *Forum Judicum* of the 7th century and the Civil Code of the nineteenth, being about six hundred years after the former and before the latter. For about three and a half centuries following its promulgation the *Forum Judicum*[2] remained the sole compilation of general laws in Spain. There were, of course, the local *fueros*,[3] and some of these afford great interest, notably those of Aragon, whose *Fueros de Sobrarbe*, composed probably before the eleventh century, have been called the Magna Charta of the Aragonese nobles and were safeguarded by an official styled *el justicia*, the last of whom, Juan Lanuza, was executed in 1591 by order of Felipe II, notwithstanding the latter had sworn to observe the *Fueros*. They were not, indeed, formally abrogated until 1707.

Toward the end of the tenth century the *Conde de Castilla*, Don Sancho Garcia, inagurated the preparation of a new code which ultimately became known as the *Fuero Viejo*.[4] Additions to it were made at the Cortes of Nagera in 1176, and it continued to have a certain force until nearly the middle of the fourteenth century.[5] It was probably composed in Latin,[6] and in its final form consisted of five books loosely arranged and without logical accumulation of contents. Book III contained some provisions regarding proof and procedure, but the work seems to have been designed primarily to meet the peculiar conditions prevailing in Castilla and to adjust the relations between its king and the nobility; and its force appears never to have extended beyond the territory of that kingdom and Leon. This necessarily left the *Forum Judicum* operative in other parts of Spain with consequent lack of uniformity.

The thirteenth century was one of the general advance for the Spanish Christian kingdoms, and law shared in the results. Moreover, as we shall see, "the Bologna revival . . . soon spread its influence to Spain."[7] The surrender of Sevilla to Fernando III in 1248 left that monarch leisure to consider the internal affairs of his dominions, and among other evils that confronted him were the diversity and confusion of the laws. To remedy these he conceived a comprehensive scheme of codification which was actually initiated by commencing the preparation of a new work

*Address before American Foreign Law Association at New York City on March 15, 1925.

1. Its title page reads, "The Laws of *Las Siete Partidas*, which are still in force in the state of Louisiana." Of course only a *judicial* finding could have determined what laws were "still in force"; but the translators appear to have selected at their own discretion.

2. See Scott's translation for the Comparative Law Bureau under the title of "The Visigothic Code." (1911).

3. These are treated in the Partidas (I, (II (VII-IX), at some length, as the equivalent of custom and usage. "The *fueros* which contain the customary jurisprudence are distinctly akin to the customs of England and Germany; the wergild and the system of compurgation, the primitive elements of election and representation, are clearly traceable."—Stubbs, Const. Hist. (6th ed.) sec. 8.

4. It is reprinted in Codigos Españoles (Madrid, 1872) Tomo I, preceded by a valuable historical sketch. (Antonio de San Martin, Editor.)

5. Id. 239.

6. Id. 226.

7. Hunter, Roman Law, 107; Cf. *post* n. 27; De San Martin, Codigos Españoles, 2 Int. XXIV.

entitled the *Setenario*.[8] But before this or any other part of his plan could be carried into effect, he died.

Alfonso the Learned

The son and successor of San Fernando was Alfonso X, commonly known as *el sabio* (the learned), because of his attainments in science and letters. Almost immediately upon his accession he took up his father's legal project, and his reign was marked by a succession of works culminating in the *Partidas*. Opinions differ[9] as to whether the *Setenario* was actually completed under Alfonso; but he caused the publication of the Especulo[10] (*"Espejo de todos los derechos,"* or mirror[11] of all rights), and later (probably[12]) the *Fuero Real*.[13] The four books of the latter touched on many subjects belonging to practically all branches of the law—government, criminal law, private substantive law and procedure. The deficiencies most apparent in it—superficiality and lack of logical arrangement—are those of the age to which it belongs. But it was not without its merits.

"This code is not a scientific book," observes a Spanish author," "but a practical one, a work of observation and compilation for a national code. . . Incomplete in the political part, it is orderly in the civil, the procedure being founded in the soundest and wisest principles and its conclusions logically drawn excepting the system of proof which belongs to the backward state in which the people were. Despite the limited commerce of that period, it contains a mercantile part and its penal portion presents a calendar sufficiently complete in view of the condition of society. We are inclined to conclude, therefore, that the *Fuero Real* can be considered a code where sufficient unity and method are displayed, that there is clarity in its laws, that its provisions are not casuistical and that it met the needs of the time."

According to Altamira[15] the *Fuero Real*

"offered certain novelties that indicate the inflow of the Roman law into the field of civil law. Such are various of the rules of intestate succession; testamentary executors; adoption—whose regulation is adjusted to the Justinian system; the accession of 'insula nata;' and a good part of the theory of contracts. In other matters (such as 'mejoras,' the prescriptive period for gaining title, and marriage) the 'Fuero Real' rectified the earlier municipal 'fueros' without adopting the Roman law; sometimes reviving mandates of the 'Fuero Juzgo' that had fallen into desuetude; at other times establishing rules of distinct form borrowed from the Canon law or other sources. A novelty of importance, and not of Roman origin, is the testament by agency (*'por comisario'*)."

The introduction of the *Fuero Real* contained the injunction "that this *Fuero* be observed forever;"[16] but whether this was anything more than the expression of a hope may well be doubted. Political conditions were decidedly unfavorable to a piece of legislation of this character[17] and its active life was brief. In Castile it was displaced as early as 1272 by re-establishing the *Fuero Viejo*,[18] though the former retained a certain authority long after the promulgation of the *Partidas*,[19] and many of its provisions are even found in the *Novisima Recopilación*[20] of 1805.

Consummation

In the year following the promulgation of the *Fuero Real* the actual compilation of the new instrument which was to realize the dream of San Fernando, began. The work is supposed[21] to have been completed in 1263—"seven books in seven years." At first it was known as *Libro (or Fuero) de las Leyes*, and it was not until the following century[22] that it came to be called *Las Partidas* or *Leyes de Partida*.

Who were the real compilers of this famous work? To this question various answers have been given. Some have ascribed it to the Italian Jurist, Azo, whom Bracton copied so copiously in the same century when the Partidas were composed.[23] Rejecting this view, La Serna[24] suggests as authors, Jacome Ruiz[25] (Jacob de las Leyes, many of whose materials, according to Altamira,[26] "were later incorporated into the Partidas"); Fernando Martinez, "a prebendary of Zamora, bishop-elect of Oviedo 1269, and ambassador of the Italian king near the Pope"; and Roldan who, "besides being reputed as a legist, edited the *Ordenamiento de las Tafurerias*," a regulation of state-owned gambling establishments. These and others are selected out of an extensive group; for as Altamira[27] says,

"We do not know who were the authors of the *Partidas;* and in view of our ignorance it is not strange that critics ascribe that work to the well-known jurisconsults of the time, some of whom are cited in its text."

But elsewhere[28] the same author concedes,

"The redaction of the 'Partidas' was the work of several jurists whose names are not cited in the text, and was done under the supervision, and subject (how much cannot be determined) to the active interventioon, of Alfonso, who was himself an author of zeal."

But, long before Altamira, Burriel, whose view was adopted by the Academy of History, maintained that there was but one author of the *Partidas* and that was Alfonso himself; stressing uniformity in plan, similarity in style to the king's other works, the acrostic on his name and a clause in his testament executed at Sevilla in 1283 in which he mentions "the book we have made . . . las Siete Partidas."[29]

At any rate Alfonso seems to have had no Tribonian (unless Ruiz), and this may further indicate his own active participation. Clearly his part seems

8. "His object was to select the best law contained in the *fueros*, general as well as municipal, and to form therefrom a single body which would be exclusive and general throughout the kingdom, thus introducing order and conformity and eliminating abuses and evils." La Serna, Introducción Historical, Codigos Españoles, 2, IV.

9. Marina thinks that it was completed only as the *Partidas;* La Serna seems to be certain that it was finished as a separate work.

10. "This code was begun, says the king, with the advice and approval of the archbishops, bishops, rich men and those learned in the law of that period, compiling the best and most equitable *fueros* of Leon and Castile. It was communicated to the towns, sealed with the leaden seal; it was directed to govern all and was intended principally for use in appeals to the king's court. Its authority was great in the 16th century, although forgotten since." La Serna, *ubi supra*, 2, V; Altamira, Continental Legal Hist. Ser. I, 620.

"El Especulo for us, signifies no more than the original plan of *Las Siete Partidas."* Henas y. Muñoz, Codigos Antiguos de España (edited by Alcubilla, Madrid, 1885) I, 590.

11. Cf. the English "Mirrour of the Justices."

12. La Serna admits that it is hardly more than conjecture, Introducción Historica, Codigos Españoles, 2, V.

13. Likewise reprinted in Codigoes Españoles, tomo I. "The learned king proceeded for its promulgation to communicate it to each of the councils in the form of a concession aand in the guise of a municipal fuero." Henas y Muñoz Reseña Historica (edited by Alcubilla) I, 108.

14. Henao y Muñoz, Reseña Historica, I, 104.

15. Continental Legal Hist. Ser. I, 628.

16. Cf. La Serna, Codigos Españoles, 2, VI.

17. "The nobility of Castile, knowing that by this code it was deprived of its ancient *fueros* and privileges, and that the power of the crown was strengthened and increased, formed the plan of overthrowing it and pursued its purpose to the extremity of opposing and conspiring directly against the sovereign, presenting an armed force in the villa of Lerma." Escriche, Diccionario, *ad verbum*,.

18. Id.

19. Id.

20. Id. Ley 1, tit. L. 1 tit. 4, Ll. 1, 2 and 3, tit. 5, Ll. 1, 2, 3, and 5, tit. 30, Book 1, L. 1 tit. 1, Ll. 1, and 2, tit. 2, Book 3, et al. of the Novisima Recopilacion are said to be respectively, Ley 8, tit. 5, tit. 5, Ll. 2 and 3, tit. 5, L. 5, tit. 5, Book 1, L. 1, 2 and 4, tit. Book 4, Ley unica, tit. 2, Book 1 and 2, tit. 6, L. 1, 3 and 6, Book 7, et al. of the Fuero Real.

21. "Its compilation was begun in 1256 and was completed, it would seem, in 1265," according to Altamira (Continental Legal Hist. Ser. I, 621) La Serna, (Codigos Españoles II, Int. XV, considers the exact date uncertain.

22. Antequera, *Historia de Legislacion Española*, 268; Codigos Españoles 2, Int. XV; Altamira (Continental Legal Hist. Ser. I, 621) gives the time as "in the 1300s."

23. See Maitland, Bracton and Azo, (Selden Soc. Pub. VIII, London 1895).

24. Codigos Españoles, II, Int. VI-VIII.

25. Altamira, Continental Legal Hist. Ser. I, 654.

26. Id.

27. Id.

28. Id. 621.

29. Antequera, Historia de la Legislacion Española, 266.

to have been less perfunctory than Justinian's—more like that of Napoleon or possibly Hammurabi.

Enforcement

The new instrument did not come into force upon its completion nor for a long period thereafter. Moreover, it appears[30] that the king went on confirming existing local *fueros*, and conceding new ones inconsistent with the *Libro de las Leyes*. From these facts some, especially Sempere, have argued that Alfonso designed only to publish a "book of doctrine"—"a legal encyclopedia, analogous to others which he made in other fields of knowledge in conformity to the spirit of the time" [31] —and that he never intended the work as a code of actual law. But that view conflicts with passages like this:

"We are pleased to command that all of our dominion be governed by these laws and no other."[32]

It seems highly probable, however, that such commands were intended really to govern a future generation and for the contemporary one, to be educative and preparatory. For Alfonzo, if he deserves half his reputation, was too "wise" not to know that immediate promulgation was premature.

Immeasurably superior as were the *Partidas* to any preceding Spanish legislation, their merits did not impress the contemporary nobles and *hidalgos*. As a learned editor[33] observes, the new code, composed in great part of Roman law and decretals, was at war with the established prejudices of the country and opposed by powerful interests. Nor was there in this anything exceptional. That identical situation existed during the same century in England where, just a score of years before the compilation of the *Partidas* was begun, the barons at Merton returned their famous negative answer to a proposal to adopt the humane, Roman doctrine of Legitimation.[34] The thirteenth century attitude toward "foreign" (i. e., Roman) law was much the same in both Spain and England; only in the former, thanks to Alfonso's foresight, it was eventually overcome, while in the latter, and its offshoots, it has continued ever since. "The English Justinian" was, unfortunately, neither a Roman nor a Spanish[35] one.

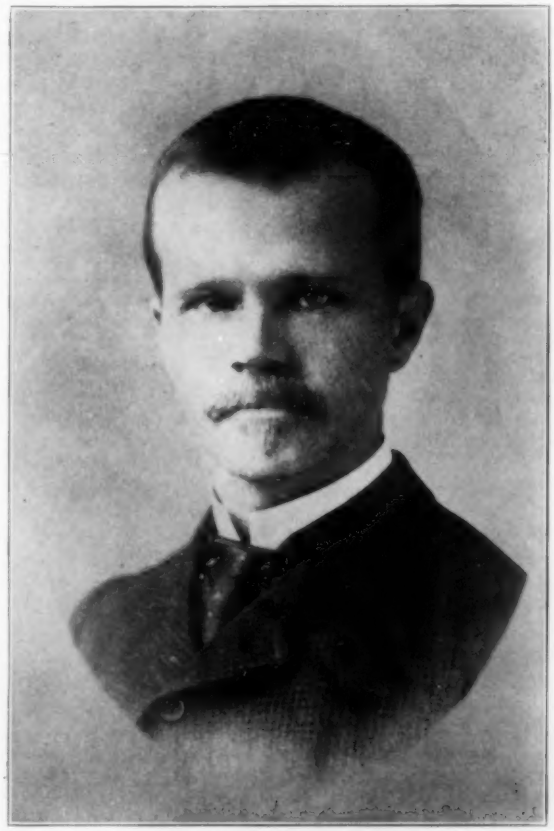
Again, "if the immediate imposition of so considerable a mass of innovations upon the cities of the Castilian crown had been possible, the derangements produced in civil life would have been enormous. Fortunately, impositions of this sort are not reconcilable with the processes of history. When attempted they are futile." [36]

It is, therefore, a mark of Alfonso's vision and sagacity that he did not seek to put his code into force during his lifetime. But to doubt that he intended it to become in time a real body of law, is not only to accuse him of inconsistency—not to say insincerity—but to deny him his worthiest claim to statesmanship.

Later History

Thus, during the reign of the learned king and several successors, the force of the *Partidas* was never more than "doctrinal" or, as we would say, academic. But such force continued to grow. For, says Altamira,[37]

30. See Altamira, ubi supra, 622.
31. Id. 621
32. *Prologo.*
33. La Serna, Introducción, XVII.
34. See Pollock & Maitland, History of England Law, I, 189.
35. Alfonso was "often called the Spanish Justinian." Sherman, Roman Law in the Modern World, I, sec. 289.
36. Altamira, Continental Legal History, Ser. I, 629.
37. Id. 622-3.



SAMUEL PARSONS SCOTT
Translator of Las Siete Partidas

"The compilation of Alfonzo X went on gaining ground among men. Among students, notably the lawyers and in the universities,[38] classes especially influenced by the Roman and the Canon law—the 'Partidas' served as a text and reference book. This is indicated by the glosses of the manuscript copies of the 1200s and 1300s, by the fact of its being read and expounded in the University classes (in Portugal and Catalonia as well), and by the publication of isolated fragments as doctrinal texts. This tendency was favored by the strictly didactic character (scientific, ethical, or historical) of not a few of the statutes—as had been likewise true of the 'Fuero Juzgo.' Doubtless through the influence of lawyers educated in the universities, who were already devoting much thought to public affairs (Alfonso X states in more than one place in his works that he consulted 'men learned in the law'), many portions of the 'Partidas' were gaining authority in legal theory, sanctioned by the then new and great prestige of the Roman law, as well as in the practice of the courts, and in the opinions of counsel. One cannot otherwise understand why, in a number of Cortes (for example, those of Segovia in 1347), representations were made to the king against certain details of the *Partidas*, which if they had *not* been enforced, could not fittingly have been characterized by the petitioners as infractions of the law."

Thus the University of Salamanca, in whose law school the *Partidas* were studied, became one of the potent agencies for the diffusion of Roman law in the peninsula. It was not until 1348, more than eighty years after their completion, that the *Partidas* were really promulgated.[39] At the Cortes of Alcala of that

38. Several of the Spanish universities, including that of Salamanca, were established in the same century with the *Partidas* "in imitation of Bologna." Sherman, Roman Law in the Modern World, I, 828.
39. "It is not until the 14th century that the civil law of Justinian supersedes the ancient customs." Stubbs, Const. Hist. I, sec. 8.

year, an *ordenamiento* was passed and confirmed by Alfonso XI, great grandson of the learned king, by which the *Partidas* were given force subject to the municipal *fueros,* the *Fuero Real* and the privileges of the nobles.[40] This, of course, was but a suppletory force, and it was only in the *Leyes de Toro,*[41] promulgated at the Cortes of Toledo in 1505, that the *Partidas* acquired full force. Just a quarter of a century later, a Royal Decree[42] provided:

"We order and command that in all causes, suits and litigations in which the laws of this compilation do not provide for the manner of their decision, and no such provision is found in special enactments passed for the Indies and still unrepealed, or those which may hereafter be so enacted, that then, the laws of this our Kingdom of Castile shall be followed, in conformity with the law of Toro, both with respect to the procedure to be followed in such cases, suits and litigations, and with respect to the decisions of the same on the merits."

This had the effect of extending the *Partidas* to the Spanish colonies—that far-flung empire which her *conquistadores* acquired for Spain in the western hemisphere as well as in Africa and Asia—and such extension gave the *Partidas* the widest territorial force ever enjoyed by any law book. For Justinian's Pandects were practically confined to the eastern empire until long after Rome's rule had ended in the west. But in Spanish America, as well as in the Philippines, the *Partidas* were and are the common, basic law. Nor has their force been limited, in the western hemisphere, to Spanish America. In a considerable group of jurisdictions now under the sovereignty of the United States, civilized law began with the *Partidas,* or shortly before. Thus, in Louisiana[43] the publication by Governor O'Reilly in 1769 of "an extract from the whole body of Spanish law, with references to the books in which they are contained . . . followed from that moment by an uninterrupted observance of the Spanish law, has been received as an introduction of the Spanish code in all its parts"—which of course included the *Partidas,* in fact they were cited in the opinion of which the foregoing forms a part and for a long time thereafter in Louisiana Reports, besides being translated, as we have seen,[44] under the authority of the legislature of that state. Indeed so late as the present century, an eminent Louisiana lawyer[45] said:

"The *Partidas* are still worthy of careful study . . . some of its provisions remained as a part of the law of the state."

And it was not only true of the state; for throughout the vast province of Louisiana the *Partidas* were once theoretically in force.

"We are informed," said the Missouri Supreme Court,[46] "that the first printed book brought into this state, containing any Spanish law, was the *Partidas* and that event occurred later than the year 1820."

So in the territory acquired from Mexico. The Spanish law remained in force in Texas until 1840[47] and the *Partidas* are frequently cited[48] in the early supreme court reports of that state. In California the Spanish law continued for a decade longer and there, too, the *Partidas* were often invoked[49] by the early judges.

That their extension to Spanish colonies was no mere formality will appear from even a casual inspection of the Supreme Court Reports of one of them, to wit, the Philippines. The series did not commence until 1901, yet in nearly every volume there are citations to the *Partidas,* while as regards at least one important subject—divorce—that collection long contained the only law in force.[50] Prior to the promulgation of the Civil Code, resort to the *Partidas* must have been relatively much more frequent. Water rights and irrigation, *e.g.,* were governed thereby down to the year 1866.[51]

So in Porto Rico;[52] and doubtless a careful search would disclose references to the *Partidas* in the law reports of numerous other jurisdictions.

Sources

1. *Roman Law*

The *Partidas* contain little direct information as to the materials used in compiling them. The compilers refer vaguely to their authorities as *los sabios antiguos*—evidently a translation of Justinian's *antiqui prudentes*[53] and probably the *Corpus Juris Civilis* was most used; for the compilers of the *Partidas* were not, like their predecessors of the *Forum Judicum,* obliged to rely on abbreviations of Alaric's type.

"The renascence of the Justinian law in Europe," says Altamira,[54] "thanks to the labors of the Italian and French jurists especially from the end of the 1000's onward, did not fail to show effects in the Peninsula. * * * The Justinian element did not attain importance there until the 1200's. In that and the preceding century, the knowledge and cultivation of the Roman law in Spain, is attested by the names of various jurisconsults (some of them students or professors in foreign universities for the most part at Bologna. Others of Italian origin resident in Spain, as the magister Jacome Ruiz); by the diffusion of Justinian texts in the original or translations; and by the existence of legal works inspired by the Justinian system."

We have seen[55] how extensive was the resort to Roman law in compiling the *Fuero Real.* Analysis of the *Partidas* will show a marked increase in this tendency, and we have only to compare the latter with the *Forum Judicum* to ascertain how vastly greater the Roman element had now become. Thus, while the former shows little trace of *patria potestas,* the latter adopts its "entire theory . . . with negation of maternal authority."[56]

"The matter of the *Partidas,*" observes Hunter,[57] is very largely derived from the Roman law, *Partida* III, being taken from it almost exclusively and *Partida* V almost word for word."

2. *Canon Law*

"The renascence which was brought about in the Church from the time of Gregory VII" (1073-85), continues Altamira,[58] "carried with it an extension of the Church's power, a favorable modification of its relations with the State and the enlargement of the personal and real immunities of the clergy, the latter being reflected in the practices of civil law. At the same time . . . the Church was . . . subject-

40. Altamira, Continental Leg. Hist. Ser. I, 623.
41. "The *Partidas* triumph in them in the law relative to sealed testaments; various particulars of succession; the cotenant's right of preferential purchase; the wife's dowry, implicitly recognized at the same time as that derived from the husband to which was given the erroneous name of *arras;* prescriptive periods; the validity of the *Senatus Consultum Vellejanum* (relating to a wife's contracts), and in other details."
42. *Recopilación de las Leyes de Indias,* lib. II, tit. I, ley 2.
43. Beard v. Poydras, 4 Mart. 348 (1816).
44. Ante n 1.
45. Howe (William Wirt), Roman and Civil Law in America, 16 Harvard. L. Rev. 342, 351.
46. Riddick vs. Walsh, 15 Mo. 536 (1859) per Scott, J.
47. Carroll v. Carroll, 20 Tex. 731 (1858).
48. See *e.g.* White v. Gay's Ex'rs. 1 Tex. 388, 389.
49. See *e.g.* Scott v. Ward, 13 Cal. 473 (1859).
50. Benedicto v. de la Rama, 3 Philippine, 34, 40, Cf. Willard's notes on the Spanish Civil Code, 16 et seq.
51. Ker v. Couden, 6 Philippine, 735, 4 Off. Gaz. 733, affirmed 223 U. S. 268, 56 L. ed. 432.
52. See 3 P. R. XXXIII, 4 Id. XX, 6 Id. XI, 7 Id. XIX.
53. Dig. De Auctore IV. Cf. Moreau Lislet and Carleton's Translation, Preface, VIII.
But Jacome (Jacobo) Ruiz had designated as "books of the sages" the works of the Italian jurists which he used. Altamira, Continental Leg. Hist. Ser. I, 654.
54. Continental Legal Hist. Ser. I, 627-8.
55. Ante n. 15.
56. Altamira, Continental Legal Hist. Ser. I, 629.
57. Roman Law (4th ed. 1903), 107.
58. Continental Leg. Hist. Ser. I, 634.

ing to its jurisdiction and to the rule of the Canon law, many institutions of the civil law, such as marriage, usurious loans, rent-charges, etc. The slow penetration of that law into the customs and statute-book of Castile is particularly observable in the field of family law, beginning with marriage itself, and in certain classes of contract—not to mention the modifications it produced in the fields of public, political, and criminal law (concession of the crown by the Pope, absolution of the subjects from oaths of allegiance, changes in criminal procedure)."

Moreover, here, as in the case of Roman law, a new repository had become available. Gratian's *Decretum*, the first formal compilation of Canon law, in anything resembling completeness, appeared before the middle of the century preceding the *Partidas* and became well known in Spain. Again, "at the Papal court many Spaniards won distinction as canonists."[58a] Among these was Raymundo de Penafort, "the famous compiler of the Decretals of Gregory IX as found in the *Corpus Juris Canonici*."[59] These Decretals appeared in 1234, about a score of years before the composition of the *Partidas* was undertaken, and seem to have been extensively used therein.

Nevertheless the *Partidas* do not always follow the Canon law. Sometimes they lag behind; as where the former retain unequal standards of marital fidelity as between husband and wife,[60] in place of the single standard established by the latter.[61] On the other hand, the secular law forbids a widow to remarry within a year, while the church law imposes no restriction.[62]

3. *Maritime Law*

"In the middle ages," observes Brissaud,[63] "the maritime law had become international. * * * By the thirteenth century the *Consulat de la Mer* on the Mediterranean, and the *Roles d' Oleron* on the Atlantic, form the common law of maritime commerce."

Spanish territory bordered both of these great seas, and the compilers of the *Partidas* had the benefit of some of these maritime collections. On the one hand, that portion of *Partida* V which treats of maritime law, "bears," it is said,[64] "so strong a family likeness to the Rules of Oleron, the basis of English maritime law, that if these are not derived from it, both have probably a common parent in the *Consulado*." The latter, on the other hand, "is said to have been digested at Barcelona; in the Catalan tongue, during the middle ages, by order of the Kings of Aragon. The Spaniards vindicated the claim of their country to the honor of this compilation; and the opinion of Casaregis, who published an Italian edition of it at Venice, in 1737, with an excellent commentary, and of Boucher, who, in 1908, translated the *Consolato* into French from an edition printed at Barcelona in 1494, are in favor of the Spanish claim."[65]

It would seem, therefore, that the compilers of the *Partidas* had material enough at hand for this phase of their task without resorting to the Digest, even accepting the claim of Benedict[66] that all of it was Roman save the "Rhodian principle."

4. *Native Law*

This brings us to the question, How much real native law found its way into the *Partidas?* That some

58a. Altamira, Continental Leg. Hist. Ser. I, 656.
59. Sherman, Roman Law in the Modern World, I, 280, Cf. 220.
60. Partida VII, tit. XVII (I).
61. *Corpus Juris Canonici* Decr. II-VI, 4, 5.
62. Partida IV (XII (III)).
63. History of French Private Law (trans. Cont. Leg. Hist. Ser. I, 241).
64. Raikes, Maritime Codes of Spain and Portugal (1896), Preface.
65. Kent, Commentaries on American Law, III, 10, 11.
66. The Historical Position of the Rhodian Law, Yale Law Journal, XVIII, 223.

WILLIAM KIXMILLER
Whose Cooperation Rendered the Publication Possible

of it did, there can be no doubt. The compilers used the *fueros* of Castilla and Leon at whose history we have glanced, together with others of Cuenca and Córdoba, all of which contributed to the structure of the *Partidas*. Occasional and exceptional provisions, like the number 12 for inquisitions and the presumption of guilt, are apparently of Visigothic origin. But no evidence has been found that this source was more than local or that the outside barbarian collections, which had appeared from time to time, in any way influenced the *Partidas*. If there was a movement throughout Europe toward the formulation of law, it would seem not to have been international nor interrelated, but to have received its common inspiration from Italy. Surely it is not without significance that the authors of the *Partidas* in Spain and Bracton in England, working contemporaneously, but unknown to each other, alike drew Roman law from Azo!

Character and Place

If we are correct in our interpretation of Alfonso's purpose and policy, we must conclude with Altamira[67] that it was his

"wish to prepare a statute or code expressive of the new influences of the Canon and Roman law in order to impose it as a common law . . . upon all his subjects."

Regardless, however, of what the king's intent may have been, the effect of his undertaking was, ultimately, to produce that very result. For the large infusion of Roman doctrines through the *Partidas*

67. Continental Legal Hist. Ser. I, 621.

changed the character of Spanish law. From a system which expressly forbade[68] its adherents to "borrow from the Roman laws," it became one in which the Roman element predominated. Thus the *Partidas* mark the reception of the Roman law in Spain. And when we recall that this eventually included the Spanish colonies and that thereby more than half of the western hemisphere, not to mention other countries, became legally Romanized, we realize how important a landmark was this in the evolution of world law.

Again the *Partidas* represent a significant step toward codification. Doubtless the idea had been suggested by Gratian's *Decretum* as well as by the revival of interest in Justinian's books; but the *Partidas* were the first extensive compilation of western secular law, after Justinian. For while there had been barbarian collections and books of customs and while the century of the *Partidas'* birth saw also the completion of the Sachsenspiegel[69] and the so-called Ordinance of St. Louis,[70] none of these approaches the *Partidas* in comprehensiveness and influence.

Estimates

And not alone in these particulars, but also in content have the merits of the *Partidas* been recognized. Naturally Spanish writers were the first to do so. Nicolas Antonio remarked, in paraphrase of Cicero, that the *Partidas* were superior to all libraries.[71] Antequera[72] characterizes it as the monumental work of Alfonso's reign, the most advanced legal collection for that time which saw the light in Europe, which has had no rival in later times, which has been and is the object of admiration of our own and foreign peoples, to which both the adherents and opponents of its doctrines have paid the tribute of lofty eulogies, and which by the extraordinary character of its conception and the superiority of its merit has received the homage of profound respect and enthusiastic applause even from those who, in this century, judge the works of remote times with an unfavorable estimate and an exacting standard.

Altamira[73] tells us that

"Its fame, which corresponded to the merits of its execution, rapidly opened it a way and gave it, among the embodiments of the national legal genius, a rank as high as any which Alfonso's ambition could have craved for it."

Indeed, the *Partidas* have so continued to grow in favor among Spaniards that they are regarded with as much pride and reverence as is the Federal Constitution among Americans, and the manuscript text of the former, now preserved in the *Biblioteca Nacional* at Madrid, is one of the prized treasures of the Spanish nation.

Outside of Spain, none of its legislation, and little of any country, has been the subject of so much praise. Samuel Astley Dunham, whose five volume "History of Spain and Portugal" is still accounted the best work on the subject in any language, and "obtained for him the distinction of being made a member of the Royal Spanish Academy," who "is stated to have had a long and intimate acquaintance with Spain" and whose knowledge of the middle ages was regarded by his friend the poet Southey as "marvellous,"[74] presents the following estimate:

"It is by far the most valuable monument of legislation, not merely of Spain but of Europe, since the publication of the Roman (Justinian) Code. . . No code in use during the middle ages is to be compared with this for extent, for natural arrangement, for the spirit of justice generally pervading its provisions, or for knowledge. It is, in fact, a complete body of morality and religion, defining the duties of every citizen, from the highest to the lowest station; assigning the grounds of their duties, and deducing one obligation from another with great precision and with some force of reasoning."[75]

A French authority[76] declares:

"We find in every page of that work the highest wisdom, and the sternest justice. It gave to the monarch under whose auspices it was executed, titles more appropriate to the epithet of 'learned' bestowed upon him by his contemporaries, than his astronomical researches, and physical scientific knowledge, however surprising the one and the other may have been considered in an age when all studies were so much disregarded. It is in that precious code that we must seek the early treasures of the Spanish language; there we shall find the characteristic features of that idiom, at a time when it retained yet a simplicity and turn, and form of expression, which gave it more freedom and ease than it now possesses, though written in an age when the language, yet unpolished, preserved much of its primitive rudeness. We, however, perceive in the style of the work a grace, a facility worthy the elevated sentiments that pervade it; and, in spite of some defects, we believe that the Spanish language, such as it was, when the *Partidas* were compiled, had already arrived at a degree of perfection which the Italian writers did not attain until many years after."

Not all the opinions, however, have been so favorable.

"Dr. Pedro de Peralta, complaining that in many interesting points of civil law the Partidas are defective says that frequently their authors dozed."[77]

"The great book of Spanish Law, called 'The *Partidas*,' observes Mr. Eugene F. Ware.[78] "has a similar history to the Pandects. The *Partidas* purport to be an original compilation of the laws of Spain, but are in fact mainly a condensation of the Pandects. . . . The *Partidas* were heralded as the most wonderful production of the Spanish jurists. How small their work and how baseless the pretensions of the authors will be shown by a comparison of the two works. . . . The *Partidas* bear the appearance of a compilation of a rude people, made from the laws of a former highly civilized race."

Arrangement and Contents

We have seen[79] that one author praises the *Partidas* "for natural arrangement." Whatever is meant by the term "natural" in that connection it certainly is not a logical arrangement. The division into seven "parts" or books is purely arbitrary (there might better have been six or eight) and avowedly symbolical.[80] Doubtless the suggestion was reinforced by the following passage from the introduction[81] to Justinian's Digest:

"We have divided the books into seven parts, not incorrectly nor without reason, but as regards the nature and use of numbers and in order to make a division of parts in keeping therewith."

But that number had long been a conspicuous feature of universal symbolism.[82] What was really

68. *Forum Judicum*, II (I, 8, 9).
69. See Continental Leg. Hist. Ser. I, 318-20, 342-4.
70. Id. 228.
71. *Codigos Españoles*, tomo II, int. XXIII, where estimates of other writers are given.
72. *Historia de la Legislación Española*. 265.
73. Continental Legal History Ser. I, 630.
74. Stephen Dictionary of National Biography (1888) XVI, 199.
75. History of Spain and Portugal (New York 1832) VI, 109, 131-2. Between these pages will also be found quite a complete synopsis of the provisions of the *Partidas*.
76. Dictionaire Historique (1810) I, 237.
77. Codigos Españoles, 2, Int. XXIII.
78. Roman Water Law, 17, 18, 141.
79. Ante n 74.
80. See the *Prologo* (Septenario, 4, 5) where the sacred character of the number 7 is elaborated at great length.
81. *Constitutio Tanta*, (Monro's ed.) XXVI, Cf. La Serna Codigos Españoles, 2 Int. XV; Howe, Studies in Civil Law (2nd Ed.) 142.
82. See Pike, Morals & Dogma, 58-60, 727-31.
"Not less symbolic was the number 7 (probably due to its being, as Philo says, a combination of 3 + 4, or, as some hold, 3 + 1 + 3, and not, as more commonly supposed, based in astrological reasons." . . . Among the Romans we have also clear evidence of its influence, as in the 7 kings, hills, testamentary seals (and witnesses) etc. Se Aulus Gellius, N.A. III, 10, 17; Apuleius, Metamorph. XI, 238." Goud*y*, (H) Tricotomy in Roman Law (Oxford, 1910), 10, 11n.

new in the *Partidas* was the utilization of that feature in forming an acrostic of Alfonso's name from the first letter of the initial words of each part's introduction. That this arrangement had no relation to the subject matter of the parts well appears from the prologue to *Partidas* IV (which, it recites, "we have placed in the middle of the seven *Partidas* . . . just as the heart is placed in the middle of the body") and also from the following conspectus:

	PARTIDA	
	Introduction	Subject matter
		I
A	servicio de Dios	Laws in general; usages, customs, *fueros*, ecclesiastical regulations (a digest of canon law)[83]
		II
L	a fé Catolica	Government and Administration
		III
F	izo nuestro señor Dios	Procedure and property[84]
		IV
O	nras señaladas	Domestic Relations
		V
N	acen entre homes	Obligations[85] and Maritime Law[86]
		VI
S	esudamente dijeron	Wills and inheritance; guardians
		VII
O	lividanza et atrevimiento	Crimes; exegesis (interpretation); general principles

83. Hunter Roman Law, 107.

84. "Taken from Roman law almost exclusively." Id.

85. "Almost word for word from Roman Law." Id.

86. See Raikes, Maritime Codes of Spain and Portugal (1896), Preface.

It is obvious enough now that the general matter in Books I and VII should have been combined; that Books III and V should each have been divided and that the provisions relating to guardians in Book VI belong in Book IV. But we are not to expect either scientific accuracy or logical arrangement from thirteenth century minds. In these particulars their work certainly excels the *Forum Judicum* and the wonder is that they did so well—even with their Roman models.

Civil Law Theory and Common Law Practice

(*Continued from page* 364)

concealed the knowledge of his invention from the public, be regarded as the real inventor and as such entitled to his reward."

Here again the wisdom of the judicial decisions seems to be incontrovertable, or at least uncontroverted. Nevertheless, Congress did provide for issue of a patent only to "the original and first inventor" of something "not known or used by others before his invention thereof," and presumably Congress used the words "in their natural sense as they would be read by the common man." Therefore, even conceding the wisdom of the judicial change, it is a change. It is arguable that courts should be privileged to change legislation in such ways and should undertake to do so, to keep it in accord with public policy without the delays incident to change by the legislature.[25] With the philosophy of what courts should or should not do we are not here concerned. Nevertheless, quite as an objective matter, the actual situation strongly suggests that the difference between Civil Law theories and Common Law practice is now, at least, something more fundamental than a mere absence of formally enacted law.

25. That such flexibility, at judicial discretion, is desirable is suggested by Mr. William Minor Lile in "Judge Made Law; An Appreciation," 53 Repts. of Am. Bar. Assn. 587.

WHY JUDGES GET BEHIND IN THEIR WORK

Missouri Legislature Light-Heartedly and Colloquially Refers to "Hootch, Moonshine, Corn Whiskey" in Statute and Then Goes Cheerfully on Its Way Leaving Courts to Wrestle With the Problem of What It Meant to Say

PROHIBITION, it seems, has not only enriched the vocabulary of the man in the streets with such terms as "hootch," and "moonshine," but it has even raised these terms to the dignity of statutory language. In 1923, the Missouri legislature passed an act making it a felony to manufacture, sell, give away, etc., any "hootch," "moonshine," "corn whiskey." Laws of Mo. 1923, p.236, sec.21. The definition of these terms has given the Missouri courts no little difficulty.

The courts' confusion is entirely pardonable, in view of the fact that at least two of these terms, "hootch" and "moonshine," have no scientific definition, and the further fact that the legislature used the words, "hootch," "moonshine," "corn whiskey," in this section without connecting them or any of them with a conjunctive of any kind, making it questionable whether the terms are to be construed as synonyms, or whether they are used disjunctively. If the words are to be taken synonymously, does it mean that the liquor meant to be designated must invariably be made from corn? If not, what is the difference between "hootch" and "moonshine" on the one hand, and "corn whiskey" on the other?

These questions, which the Missouri courts have wrestled with in almost a score of cases, without arriving at any very satisfactory or definite construction,

are the subject of a recent article by Mr. Ben Ely of the Missouri Bar, in the University of Missouri Bulletin (Law Series 39).

A reading of this article would surely sober any reader who may be inclined to take this subject lightly. To solve the meaning of these three words, so commonly and casually used in the American slanguage of the day, Mr. Ely finds it necessary to plunge at once into fundamental questions of constitutional law, and from there immediately into Philosophy and Psychology, progressing with rapid strides into Jurisprudence and Metaphysics, conjunctive congruent jural relations, zygnomic duties and the Meaning of Meaning.

These problems, however, insofar as they affect the question, are laid low in the first two pages, and on page three the Missouri statute is set forth. It seems that in the Missouri prohibition enforcement act of 1923, an attempt was made to punish more severely than other offenses the dealing in certain specified kinds of intoxicants thought to be more dangerous to the public health and safety than the general run of such liquors. Section 20 of that act provided that the maker or seller of "hootch, moonshine, corn whiskey, or other intoxicating liquor" which caused the death of any person, or caused insanity or blindness, should be punished by imprisonment in the state penitentiary for a term of from two years to life. Section 21, with which we are here more particularly concerned, provided that: "If any person shall manufacture, make, brew, distil, sell, give away or transport any 'hootch,' 'moonshine,' 'corn whiskey,' shall be guilty of a felony . . . ."

"It will be noticed," points out Mr. Ely, "that the language of this section follows that of section 20, save and except that section 21 omits the words 'or other intoxicating liquors,'" and he suggests that it may be possible that the legislature intended to include the whole phrase in Section 21, and that through a clerical error, the last portion of it was omitted. But this, he says, would seem improbable.

Before attempting to solve the meaning of the words "hootch, moonshine, corn whiskey," as they appear in section 21, "by a purely inductive study of the decisions," the writer feels it well to analyze "just what kind of intoxicating liquors are ordinarily met with in the work of prohibition enforcement," and with that the article launches into an explanation of the chemistry of brewing and distilling, the ingredients used, the processes followed, the interactions resulting, and the chemical formulas therefor, all of which is set forth in order to prove that, "the principal classification, then, is into liquors which are only fermented or brewed and those which are distilled . . . ."

The reader being now intellectually girded to attack the problem of construing "hootch, moonshine, corn whiskey," the decisions on the subject are reviewed by Mr. Ely.

In the first case under the section, the article says, the court held that the words, not being connected with a disjunctive or a conjunctive, must be taken as synonymous. State v. Brown, 304 Mo.78.

In another case, counsel for the defendant argued before the Supreme Court that the words of the statute, "if any person shall make . . . any 'hootch,' 'moonshine,' 'corn whiskey,' shall be guilty of a felony," could only be construed to mean that, whenever any person made or sold moonshine, then *corn whiskey* would be guilty of a felony! This was an absurd proposition of law, insisted counsel, rightly enough, and so the statute was so indefinite as to constitute a denial of due process. But the court held that the word "or" must be understood between the word "moonshine" and the words "corn whiskey," and that with that addition the statute is sufficiently plain in its meaning. State v. Combs, 273 S.W.1037.

But, as Mr. Ely suggests, this construction seems somewhat out of harmony with the theory of the Brown case that the three terms are synonymous.

Soon afterward, the court frankly admitted that "we are convinced that we were wrong in holding the terms 'hootch,' 'moonshine' and 'corn whiskey' to be synonymous." State v. Pinto, 279 S.W.144. Moonshine, it was there said, "means liquor manufactured illegally."

Nevertheless, on the same day as the Pinto case, the court decided another, State v. Morris, 279 S.W. 141, in which the Supreme Court said the instructions were in harmony with the Brown case (which the Pinto case admitted was incorrect), but which Mr. Ely points out was "clearly inconsistent."

Sixteen cases arising under this section are reviewed by Mr. Ely, from which he sums up the law as it exists today as follows:

"It seems clear that the word 'or' must be understood between the word 'moonshine' and the words 'corn whiskey' used in the statute. The words are not to be understood as synonymous, but the terms hootch and moonshine are to be taken as general terms designating a large class or genus of intoxicating liquors of which corn whiskey is but a single species. The statute makes it a felony to sell any kind of moonshine. This felony may be committed in several ways by the sale of the various kinds of moonshine, and among the others of corn whiskey. It seems that at least after verdict, a variance between the allegation of a sale or transportation or manufacture of one kind of moonshine, e.g., of corn whiskey, and the proof of the sale of some other kind of moonshine, will not be a fatal one."

What liquors are included within the scope of the term "moonshine," Mr. Ely defines thus:

"Hootch or moonshine, as those terms are used in the prohibition act of 1923 are distilled intoxicating liquors which contain more than one-half of one percent of ethyl alcohol by volume, and are potable and fit for beverage purposes, and which have been manufactured without a permit from the government of the United States and the government of the State, regardless of the materials used in their production."

This definition, Mr. Ely submits, "is clearly consistent with all of the Missouri cases except those which the court itself has plainly overruled;" and, he says, "embodies a wise social policy and is practically workable."

JUDICIAL EXECUTION BY BURNING AT THE STAKE IN NEW YORK

By Hon. William Renwick Riddell, LL. D., D.C.L., etc.
Justice of Appeal, Ontario

THAT the punishment of death by burning at the stake was, by the Common Law, and until its abolition in 1790 by the Act 30 George III, c. 48, awarded in England against women found guilty of Petit Treason, is well known to all students of Blackstone—see, e.g., Blackstone's *Commentaries*, Bk. IV, p. 204: that this horrible form of execution was employed as late as the time of James I, in cases of heresy, when the unfortunate heretic — not uncommonly, simply insane—"was handed over to the secular arm," everyone can see from the pages of Howell's *State Trials*. Of course, the witch being also a heretic was burned at the stake—hundreds of thousands died in this way for what we are apt to consider an imaginary crime. We read in the *Malleus Maleficarum*, the great authority on Witchcraft, that in one County on the Continent, no fewer than forty-one witches were burned in the year 1485. So far did the practice of burning women go that in the early Common Law, a woman was sentenced to that form of death if she was present when her husband committed murder, the husband being hanged. Blackstone's delightful reason for the difference in punishment of women and men will, it is to be feared, not convince the modern reader: *Commentaries*, Bk. IV. p. 93—"In treasons of every kind the punishment of women is the same, and different from that of men. For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence . . . . . is to be drawn to the gallows, and there to be burned alive." That this was the law, at least in theory, in the American Colonies is equally unquestioned; but it is not so well known that in some parts of the British dominions in North America, this punishment was lawful, and that by the expressed will of the Colonists themselves, not imposed upon them by the Mother country; and in a class of case to which it was not applicable in England.

In Scottish law, the execution by burning at the stake seems at one time to have been not uncommon, and by no means limited to the fair sex; e. g. we read in Francis Watt's *The Book of Edinburgh Anecdote*, pp. 275, 276, that in 1570, John Kelloe, Minister of Spott, near Dunbar, who had murdered his wife was strangled and burned at the stake; also, a boy who had burned down a house was burned alive "as an example". Of course, however, the American Colonies took their Common Law from England and not at all from Scotland.

In the year 1741, there was discovered in the City of New York, a conspiracy of murder, arson and theft; and there resulted criminal proceedings in the Courts; "the arrest, indictment, trial and execution of thirty-three of the conspirators, thirteen of whom were burned at the stake." Mr. Justice Daniel Horsmanden, who had presided at many of the trials, published in 1744 a quarto volume entitled: *A Journal of the Proceedings in the detection of the conspiracy formed by some white people in conjunction with Negro and other slaves for burning the City of New York in America and Murdering the Inhabitants in 1741-2.* There was a Reprint in octavo in London in 1748 and another in New York in 1810—these are not very rare: an octavo edition edited by William B. Wedgwood, Esq., was published in four parts by George W. Schott, 177 Washington Street, New York, in 1851, which occasionally turns up in the second-hand bookstores. It has no merits beyond containing a somewhat interesting account of Liberia, a characteristic glorification of the Stars and Stripes and condemnation of the Old Land across the Sea. The author, Mr. Justice Horsmanden, has a strong anti-Catholic bias; and more than suspects the sanguinary Church of Rome to be at the bottom of the trouble: while the Lieutenant Governor, Clarke, was sure "that the hand of Popery is in it . . . . a Romish Priest having . . . . been convicted of having a deep share in it." It is, indeed, more than possible that a modern would fail to find the proceedings the "full and clear evidence" spoken of by the Governor.

It is not my purpose to detail the particulars of the conspiracy—these can be found in the 6th. volume of *Documents relative to the Colonial History of the State of New York*, Albany, 1858: but only to give some account of the trial and execution of the first conspirators who were burned at the stake for their crimes.

First, as to the law: in 1708, Lord Cornbury reported to the Home Authorities, that an Indian Slave (male), and a Negro woman had murdered their Master, Mistress and seven children; and that being tried and convicted, the man was sentenced to be hanged and the woman to be burnt, which sentence was carried into effect without delay. It was thought in the Colony that it would be well to increase the terror of the sanction in the case of a man slave to the same height as that of the woman slave. Of course, the sentences alluded to were in strict accordance with the existing English law; but that gave no power to have the man burnt at the stake, as the woman might. Accordingly, in the same year, 1708, was passed by the Legislature of the Colony of New York, an Act which was intended to prevent the like acts as the murder of "William Hallet jun., late of New-Town in Queen's County Gent.," and which directed that any Negro, Indian or other Slave who should murder or attempt to murder "any of Her Majesty's liege People (not being Negroes, Malotta's or Slaves), should suffer the Pains of Death in such manner and with such Circumstances as the Aggravation and Enormity of their Crime in the Judgment of the Justices shall merit and require." This was euphemism for "to be burnt at the stake;" but legislatures were a little mealy-mouthed, possibly because they knew that the Act must run the gauntlet of The Lords of Trade and Commerce across the sea. See my Article: *The Slave in Early New York*, 13 Journal of Negro History, January, 1928, pp. 53, *sqq.*

In 1712, took place that extraordinary incident in the history of New York, the Negro Insurrection, described

by the Governor Robert Hunter as a "bloody conspiracy of some of the Slaves of this place to destroy as many of the inhabitants as they could . . . to revenge themselves for . . . hard usage. . . ." This was the more disquieting as it synchronized with an alarming uprising of Slaves in South Carolina. Six persons implicated in the New York "Insurrection" committed suicide, 27 were condemned to death, of whom 21 were executed, some being "burnt at the stake, others hanged, one broke on the wheele and one hung alive in chains in the town" according to the Governor's official report.

Some doubt seems to have been entertained as to the strict legality of the extraordinary executions—or perhaps the Act of 1708 was not wide enough. We find the Legislature in "the fourth year of the King," (1720-1), passing a new Act; and this Act so passed had a much wider application. It is a Statute of 4 George II, and provides, *inter alia*, "That all and every negro, Indian or other slave or slaves who shall murder or otherwise kill unless by misadventure or in the execution of justice or conspire or attempt the death of any of his majesty's liege people, not being slaves; or shall wilfully burn any dwelling house, barn, stable, outhouse, stacks of corn or hay . . . . shall suffer the pains of death in such manner and with such circumstances as the aggravation or enormity of their crime . . . . shall merit and require." It will be seen that this is but an enlargement of the scope of the Act of 1708, already mentioned. This was the law in force at the time of the Conspiracy of 1741-2.

The two persons first burned at the stake were Cuffee (or Cuff) the property of Adolph Philipse, Esq., and Quaco (or Quack) the property of Mr. John Roosevelt (who, not being English, was not an Esquire, but only plain Mr.). Cuffee was one of the three most prominent leaders in mischief, being a very prominent member of the "Geneva" Club, so-called from its origin in stolen Geneva, known in these degenerate days as Gin. How he escaped being indicted along with two other leaders, Caesar (belonging to Mr. John Varack, Baker), and Prince (belonging to Mr. John Auboyneau) does not appear. Whatever the reason, these two were the first indicted. The indictment was for entering the dwelling house of Robert Hogg with intent to commit a felony therein and for larceny. Tried before Mr. Justice Frederick Philipse, Second Justice, and Mr. Justice Daniel Horsmanden, Third Justice, in the Supreme Court, Friday, May 1, 1741, Caesar and Prince were properly convicted: they were hanged and Caesar's body hung in chains, the gibbet being "fixed on the island near the powder house."

By a practice which I fail to understand, the conviction of these two Negroes was read by the Attorney-General, in prosecuting Hughson (who was confidently asserted to have been the real originator of the trouble), with his wife and a lady of easy virtue, the concubine of Caesar and with him, the parent "not many days before the robbery at Hogg's of a babe largely partaking of a dark complexion" (as the learned Judge puts it by a delightful meiosis), and who rejoiced in the names of Peggy, Margaret Sorubiero, Marget Kerry (or Carey), Margaret Sarinbirr (or Saligburgh) and the Newfoundland Irish Beauty, these three being indicted for receiving. They were, of course, convicted and sentenced to be hanged—Hughson's body made to decorate another gibbet. The Newfoundland lady, who had been recalcitrant, becoming alarmed, made very full disclosures as to, at least, part of the Conspiracy; but it was suspected that she was keeping something back; and, accordingly, while in the expectation that she "would come to a resolution to make an ingenuous confession on order to save herself," the Judges were induced to recommend her to the Lieutenant Governor for a pardon, it was on this condition nevertheless, "that it should not pass the seal till she should be thought amply to have merited it." And "a pardon was accordingly prepared for her, ready to pass the seal when it should be sent for by the Judges." Sarah, Hughson's young daughter, who made ample disclosures, received a pardon.

To come to the unfortunates, who were first burned at the stake for this Conspiracy, as we have seen—Cuffee was a *mauvais sujet:* "His master being a single man, and little at home, Cuffee had a great deal of idle time" with the proverbial result: he "employed it to very ill purposes, and . . . acquired a general bad name." That he had participated in the plunder from the Hogg burglary, was certain: and he formed with Caesar and Prince, the turiumvirate who were at the head of the "Geneva Club." The conspirators divided the city into two sections, each with its "Lodge" (which to the disgust of real Masons, took the name of Free Masons), that in the east end of the Town being composed of the *Fly Boys;* and that in the west of *Long Bridge Boys*, the former meeting at the house of one Romme, who fled as soon as the Hogg burglary came to be investigated, while the *Long Bridge Boys* of the Geneva Club met at Hughson's.

Quaco does not seem to have known much English; it is not unlikely that he was one of the Spanish Mulattos, who were so troublesome in old New York—many of them actually, and some with truth, claimed to be free-born and torn from their homes by piratical slave-traders; and more than once they caused disturbances. Quaco was a *Fly Boy*, "one of *Smith's Fly Boys*," as Cuffee described him, and was married to the Governor's cook. His master kept him busy by day, but he made the most of his nights.

The prosecution took no chances; evidence was obtained from all quarters, Romme was captured at Brunswick, New Jersey, and brought back to be interrogated; "Albert Price having been found by experience to be very adroit at pumping out the secrets of the conspirators. . . . the under-sheriff was ordered to put Cuffee into the same cell with him, and to give them a tankard of punch now and then, in order to cheer up their spirits, and make them more sociable." This trick was eminently successful. Cuffee gave most valuable information, which was used against him and others. When Quaco was arrested and committed, Cuffee shut up and refused, too late, to give any more information.

At the trial the evidence of Negro Slaves was admitted for the prosecution—not under oath, however, which was wholly regular, being authorized by the Legislature. As the Prosecuting Counsel, Attorney-General Smith said to the Jury: "the law requires no oath to be administered to them, and indeed, it would seem to be a profanation of it, to administer it to a heathen in the legal form . . . . the Court has no power to administer an oath but in the common form, and if pagan negroes could not be received as witnesses against each other without an oath in legal form, it is easy to perceive that the greatest villainies would often pass with impunity." Blackstone was not yet with his *Commentaries*, Book III, pp. 369, 370; but surely *Omy-*

chund v. Barker, I Atk. 21:2 Eq Avr. 397: Willis's Reports, 538, was known to the profession.

Sandy, *alias* Sawny, Niblet's Negro boy of about 16 or 17 years of age was brought down from Albany and strictly interrogated—in fact, nothing was left undone to get at the facts.

At length, on Thursday, May 28th, Cuffee and Quaco were arraigned; pleading Not Guilty to the two Indictments for conspiracy to murder the inhabitants and burn the town, and for two actual burnings, the house in the Fort and Mr. Philipse's house: the trial was adjourned until next day. On that day, the trial proceeded before the two Justices, Philipse and Horsmanden, Second and Third Justices, respectively, with a Jury. The case was proved to a demonstration, and three witnesses originally named for the defence, Aldermen Bancker and Johnson with Mr. John Aubeyneau, did the prisoners no good, nor did the ten called at the trial in addition and at the request of the prisoners, including their masters. Philipse, Cuffee's master, "as to his character . . . . could say nothing" and Roosevelt, Quaco's master, and his son, gave no evidence of value.

Mr. Justice Horsmanden gave the convicts a fearful tongue lashing, and pronounced the dread sentence: "That you and each of you be carried from hence to the place from whence you came, and from thence to the place of execution, where you and each of you shall be chained to a stake, and burnt to death: and the Lord have mercy upon your poor wretched souls." The execution was ordered for the following day, Saturday, May 30th.

On this day they were burned at the stake according to the sentence. The shocking account reads:

"The spectators . . . . were very numerous; about three o'clock, the criminals were brought to the stake, surrounded with piles of wood ready to set fire to, which the people were very impatient to have done, their resentment being raised to the utmost pitch against them, and no wonder. The criminals showed great terror in their countenances, and looked as if they would gladly have discoverd all they knew of this accursed scheme, could they have had any encouragement to hope for a reprieve. But as the case was, they might flatter themselves with hopes: they both seemed inclined to make some confession; the only difficulty between them at last being who should speak first." It is perfectly obvious that there never was any intention to show the slightest mercy to the unfortunate wretches; but that they were encouraged to think that they might be at least reprieved seems equally plain—the story continues: "Mr. Moore, the deputy secretary, undertook singly to examine them both, endeavoring to persuade them to confess their guilt, and all they knew of the matter, without effect; till at length Mr. Roosevelt came up to him, and said he would undertake Quaco (who, it will be remembered, was his slave) while Mr. Moore examined Cuffee; but before they could proceed to the purpose, each of them was obliged to flatter his respective criminal that his fellow sufferer had begun, which stratagem prevailed. Mr. Roosevelt stuck to Quaco altogether, and Mr. Moore took Cuffee's confession." This dirty trick, "stratagems" as it is called, is related without a sign of shame, and rather with a glow of self-congratulatory satisfaction by the learned Judge; and then we have the confessions, full enough, be it said.

There never had been the slightest intention to implement the hopes raised by the inquisitors; the horrible scene continued, to the satisfaction of the "very numerous spectators"—this reads like the story of a very recent occurrence in a Mississippi state—"these criminals' acknowledgement of their own guilt . . . . was by them particularly and expressly confirmed in the midst of flames, which is the highest attestation."

I must not omit to notice the patriotic conduct of the members of the Bar during these prosecutions: "The gentlemen of the law generously and unanimously offered to give their assistance on every trial in their turns, as this was conceived to be a matter that not only affected the City, but the whole Province." This, be it remembered, was not an offer to defend the accused but to prosecute them.

But one other bright spot have I found in all this dark page of history—the superb confidence of some of the conspirators in the constancy and fidelity of their fellows, though themselves betraying others. Cuffee by whose betrayal of his pledged faith, confirmed by an oath, many were arrested and some lost their lives on the scaffold or at the stake, himself, when Caesar was in prison, awaiting trial for the Hogg robbery, expressed confidence that Caesar would not betray him; and, after the conviction of Caesar and Prince, on being asked by his fellow prisoner, who was so "adroit at pumping out the secrets" of the accused, Arthur Price, the servant of Captain Vincent Pearce, in prison for stealing some property of the Governor's, "if he was not afraid that the two Negroes who were to be executed on Monday would" discover the conspiracy, he answered "that he was not afraid of that, for that he was sure they would be burnt to ashes before they would discover it; he would lay his life on it."

It may perhaps be noted that the City of New York was not the only place which witnessed such hideous scenes. The Judge tells us that at the beginning of May, 1741, "at Hackensack, in New Jersey, eight miles from this City, the inhabitants of that place were alarmed about an hour before day, and presented with a most melancholy and affrighting scene!" One would expect to follow a description of carnage, human life sacrificed, human blood spilt—but the narrative continues: "No less than seven barns in that neighborhood were all in flames; and the fire got such head, that all assistance was in vain. Two Negroes, the one belonging to Derick Van Hoorn, the other to Albert Van Vorheise, were suspected to have been guilty of this act; the former having been seen coming out of one of the barns with a loaded gun, who pretended, on his being discovered, that he saw the person who had fired the barns, upon which his master ordered him to fire at him, and the Negro thereupon immediately discharged his piece. The latter was found at his master's house loading a gun with two bullets, which he had in his hand ready to put in. Upon these and other presumptive (mark the word!) circumstances and proofs, both Negroes were apprehended, and in a few days tried, convicted, and burnt at a stake—the former confessed that he had set fire to three of the barns; the latter would confess nothing."

As is well known, in England the practice sprang up of strangling the woman to be burned, and then burning her dead body—just as in the execution of a man for High Treason, while the sentence was that he should be cut down when still alive and disembowelled, the practice was to allow him to hang till he was dead,

and then cut him down. It is said that this practice was not always successful, the story being told that Harrison, the Regicide, hanged and cut down, supposedly dead, sprang up and grappled with the executioner when he felt the knife.

It is certain that no such mercy was exercised to the New York Negroes—they confessed "in the flames".

It may be a matter of congratulation that while Judge Lynch may still condemn to death at the stake, the more regular Courts have neither the power nor the inclination to do so—hanging or the "hot chair" answers every purpose.

PRESIDENT WICKERSHAM'S ADDRESS

(Continued from Page 338)

that the objects of the Institute had to do with American law, and its better adaptation to the social needs of our country, it was inexpedient that any but citizens of the United States should have full membership in the Institute, but the Council resolved to recommend the creation of a class of Corresponding Members from countries other than the United States, in order that we may have the benefit of the exchange of ideas, opinions and views with lawyers of other countries, particularly in those whose systems of jurisprudence are based upon the English common law.

At the last annual meeting I referred to the approaching limit of the term of the undertakings in which we are directly engaged, I stated that it would be remembered that the grant from the Carnegie Corporation would expire in March, 1932, and I expressed the hope that when we had finished this task we should have so mobilized the legal scholarship of America that our Institute would be prepared to address itself to new and even greater enterprises than our present undertaking. The Executive Committee, in November last, adopted a resolution requesting the Director from time to time to prepare and submit to it statements bearing on matters which should be considered in relation to the future of the Institute and specifically, at the earliest possible moment, a statement setting forth pertinent matters in connection with the work on the restatement of the common law. The Director will draw your attention to some of these matters in his report to this meeting.

Important and far-reaching in its anticipated results as is the work with which we are busy, it occupies but a small portion of the field of law and the administration of justice in States and Nation. We must be well aware that there is legitimate cause for great dissatisfaction with the administration of the law in the United States and that that dissatisfaction is growing. At the same time I believe that never in our history has the bar been more alive to those conditions than at the present time. Much is being done to remedy these defects. A great deal of useful work is being accomplished in several states by the Judicial Councils—organized bodies of lawyers and judges charged with the duty of studying the workings of their judicial systems, and with the formulation for the consideration of courts and legislatures, of measures for improvement in the law and procedure in both civil and criminal jurisprudence. Committees of bar associations, local, state and national, also are engaged in studying conditions in their respective jurisdictions, submitting the results of their inquiries for public discussion and for legislative and judicial action. Some legislation has been enacted in the States looking to the removal of particular grievances. Very recently the three Bar Associations in the City of New York, with the hearty cooperation of the courts, have shown how to make very substantial progress in the removal of undue delays in bringing issues to trial and in grappling vigorously with abuses of professional privileges and the violation of professional ethics by a certain class of lawyers, in connection with what is known as "ambulance chasing." The proceedings of these Committees have led to changes in calendar practice, which have greatly reduced delay in reaching trial and also have led to the prosecution and disbarment or suspension from practice of a very considerable number of lawyers, who were engaged in the business of "ambulance chasing." The thoroughness and the vigor with which these matters have been prosecuted reflect credit upon both bench and bar. It is sad to record that the Legislature of the State of New York received with complete lack of sympathy certain proposed legislation suggested by the Bar Associations to make permanent the reforms they had accomplished. The attitude of the legislative committees with regard to these measures indicates the need of a wider education concerning the methods of the class of lawyers engaged in this sort of practice and their influence upon the administration of law in general. Abuses in the administration of the Bankruptcy Law in some of our Federal courts also have recently been the subject of much notoriety and investigation by bar associations and Congressional committees. In this field also the local Bar Associations have shown themselves vigilant and active in inquiry and prosecution of the evils discovered.

But while all of these efforts are useful and meritorious, neither singly nor collectively have they reached and exposed, still less reformed, the greatest of all existing evils, namely, a widespread disregard for law on the part of a considerable part of the American people, and chronic delays and uncertainties in the prevention, detection, prosecution and conviction of crime. So serious is the condition in this regard that the President of the United States has conceived it to be the most important duty confronting him on assuming office, to challenge the attention of the American people, by placing the situation clearly before them, and by announcing his purpose to name a national commission to investigate the existing agencies of law enforcement, with a view to a reorganization of our system in such manner as to eliminate many of its weaknesses and its defects. No more challenging statement has ever been made by the Chief Execu-

tive of the nation than that of President Hoover in his recent address in New York, when he said that the enforcement and obedience to the law of the United States, both Federal and State, was the dominant issue before the American people.

"Every student of our law enforcement," said the President, "knows full well that it is in need of vigorous reorganization; that its procedure unduly favors the criminal; that our judiciary needs to be strengthened; that the method of assembling our juries needs revision; that justice must be more swift and sure. In our desire to be merciful the pendulum has swung in favor of the prisoner and far away from the protection of society."

The President added to this statement which challenges the faith, the ideals, and the traditions of the American bar, when he said:

"What we are facing today is something far larger and more fundamental—the possibility that respect for law as law is fading from the sensibilities of our people."

This is a clarion call to the legal profession throughout the land. We in this Institute have been striving to make the common law of the land more clear, less obscured by uncertainties and contradictions, than it ever has been, so that it may be more uniformly understood throughout the nation. We also have been striving to prepare for submission to the legislatures of the various States a model Code of Criminal Procedure, which shall abolish all those technicalities that have been the refuge and protection of criminals in the past. But the President's challenge shows that we must broaden our phylacteries and through our membership of several hundred lawyers, selected from members of the bar all over this land, exert our influence, individually and collectively, in bringing the minds of the people back to a recognition of the essential foundations upon which our nation was builded and upon which our form of government must rest, which is respect for law as law. Without this, the institutions of our constitutional government which were cemented with the blood of our ancestors cannot endure. Here then opens before us a higher duty than any we have previously undertaken. Precisely how it shall be accomplished, just what improvements must be made, just where the greatest evil is to be grappled with, I do not pretend to suggest. But that it must be met; that the minds of our people must be led to appreciate that all civilization rests upon respect for law, and that self-government ceases to be possible unless the law of the land commands the respect of our citizenry, are surely fundamental truths not needed to be demonstrated to this body. When the President's Commission is appointed, it will need the assistance of the Bar. I feel confident that the associated learning and experience of those composing this Institute, and especially of the scholars engaged in its work, can contribute incalculable aid to any body charged with the duties which the President has indicated he means to devolve upon that Commission, and I feel confident that the members will gladly exert themselves to the utmost in aid of its high purpose. I see here an opportunity for higher usefulness, such as in my last annual address I referred to. There is involved more than the policy of any one particular kind of law. There is involved the perpetuation of civil liberty which cannot long endure if the law of the land loosens its hold upon the consciences of the citizens of the United States.

Reasons for Joining the American Bar Association

"WHY should I join the American Bar Association?" is a question that is frequently asked by lawyers.

You should join it because the American Bar Association is doing more than any single agency today to cultivate a correct attitude in the public towards the profession—to show it what the profession as a whole really stands for.

You should join it because it is an eminently practical organization which proposes eminently practical ends.

You should join it because you owe it to yourself. It is a means of enlarging your professional self by enlarging your range of interests. It is a means of making acquaintances all over the country who may be some time of great value. It enables you to keep in touch with the most important things that are being done in the field of your chosen profession.

You should join it because you owe a duty to your profession higher than merely to get a living out of it. It is a profession with a great tradition of public service, and the American Bar Association peculiarly embodies this tradition in the national field. Its efforts are devoted to the improvement of the administration of justice, to promoting the science of jurisprudence, to simplification of law, to the maintenance of correct professional standards of Bench and Bar: all public objects of the first importance. No real lawyer should feel himself without obligation to do his share to maintain this great tradition of the profession.

You should join it because only through professional solidarity can these purposes be achieved; and professional solidarity in any real sense is an empty word today unless it manifests itself in effective organization.

You should join it because the Journal of the American Bar Association, the official organ, will bring to you every month, without additional cost, a series of interesting and worth-while articles by members of the profession who are on the legal firing line, as practitioners, Judges, and teachers of the law. It will furnish you with material which, if properly preserved, will be useful on more than one occasion.

You should join it because the annual meetings are becoming more and more interesting and significant for those who attend, and because those who do not attend are afforded a practical participation in its proceedings by an accurate report in the Journal and a subsequent more extensive publication of proceedings and papers in the Annual Report.

You should join it because the Annual Report of the Association, furnished to members without additional cost, is a publication full of valuable material. It includes a list of the members of the Association, classified by cities and states, which constitutes a useful professional Directory.

You should join it because every lawyer in the country can readily afford to pay the nominal membership fee. Membership imposes not the slightest financial burden.

THE MIXED COURTS OF EGYPT

The United States as One of the Outstanding Capitulatory Nations, and Because of Its Growing Commercial, Financial and Archaeological Enterprises in Egypt, Has an Interest in the Movement to Modify the Capitulations and Extend the Competence of the Mixed Tribunals

By Hon. Pierre Crabitès
Judge of the Mixed Tribunals, Cairo, Egypt

KING Fuad of Egypt, in his last speech from the Throne, announced on November 17, 1927, that the policy of the Egyptian Government was now directed towards modifying the Capitulations and towards extending the competence of the Mixed Tribunals. His Majesty added that, as soon as possible after the New Year, an international conference would be held in order to give effect to this latter proposition. The ground for this reunion was prepared by an official Note which Cairo issued in December, 1927. But the Egyptian Ministry fell while the matter was still in abeyance. Towards the end of October, 1928, Egypt again took up the matter. This reopening of the subject by the Dictatorship emphasizes the importance which all Egyptians attach to it.

The problem means a great deal to the United States. America is one of the outstanding Capitulatory Nations. She has important and expanding commercial, financial, archaeological, missionary and educational interests in the Valley of the Nile. Her name stands second in the list of purchasers of Egyptian products. She ranks high as an exporter to Egypt. The Suez Canal traverses that land. Our Merchant Marine has made our flag a familiar sight along this waterway. American tourist travel assures the prosperity of the country's important hotel industry. The open purse of our women fattens sleek dragomans. Their abiding faith is the life giving elixir of the Egyptian curio bazaars. Moreover, in 1876 when the Mixed Courts were created and Washington was still a relatively unknown factor upon the world's horizon the United States was officially recognized as one of the seven Nations entitled to preferred treatment in the constitution of the new Judiciary.

The Treaties which put an end to the Great War deprived Austria and Germany of their Capitulations. Bolshevism drove Russia out of Egypt. It, therefore, came to pass that when His Majesty, King Fuad, delivered his speech from the Throne England, France, Italy and America were the sole survivors of the orginal seven Nations entitled to preferential treatment in making up the benches of the Mixed Courts. There were, of course, the secondary Powers which helped to inaugurate this reform. They, however, were placed in another category in respect of representation in the new international judiciary.

I was not in Egypt during the winter of 1927-1928. When I returned to Cairo in the following spring I was told that two of the remaining quartette just referred to had sought to place the United States in this second class compartment. An insistent rumor to that effect was current in Mixed Court circles. It may not have had a vestige of truth back of it. But the talk was current gossip. It cited the names of France and of Italy. It reported that they had made love to Greece and had said to her:

> "England departed from time honored tradition when she took over for herself the Austro-German seats on the Appellate Bench of the Mixed Tribunals. This was done during the days of the Protectorate. Egypt is now independent. Things are, therefore, at the present moment where they were in 1876. It is proposed to grant the Mixed Courts a limited measure of criminal jurisdiction. Greek nationals will supply a large percentage of the business of these proposed new Benches. If you will help us to have Latin penal law applied by them we are prepared to form a Franco-Italo-Greek combine to insist that we three get the cream of the new billets and that the secondary Powers receive no cream and but little milk."

All this I repeat is but hearsay. It is not good evidence. It is, however, of interest to know what was said about the United States, even if France and Italy may have had no intention of giving our first class seat to Greece. Whether there ever was or was not a particle of truth in all of this chatter no one will probably ever know, because the Egyptian Ministry fell and the invitation to attend the International Conference was withdrawn. But the very fact that all of these tales were told last year tends to give the Department of State an additional incentive for insisting upon the maintenance of the vested rights of the United States.

To connect all of this alleged intrigue and these vested rights with my subject, I should perhaps begin by saying something about the spirit which underlies the Capitulations. To do so would carry me back to the seventh century of our era. I covered the subject in a paper entitled "The Courts of Egypt" which the American Bar Association Journal published in August, 1927. All that I shall now say is that Egypt, until the Mixed Tribunals were created in 1876, knew nothing of "territorial" law. Before that date all law, in that country, was "personal." Everybody there enjoyed diplomatic immunity in respect of judicial procedure. No foreigner could be sued for debt before the local courts or there prosecuted for crime.

The calling into being of the Mixed Tribunals modified this abnormality as regards civil matters. It left conditions unchanged, for all practical purposes, in so far as they affected criminal actions. It is now proposed by the Egyptian Government to give these Courts limited penal jurisdiction. It is quite generally believed however, that this modification is but an opening wedge. It is asserted that

it is the desire of the Cairo authorities eventually to do away with the entire criminal competence of the Consular Corps. It is generally believed that the moving spirits of the "Continental bloc" before referred to favor this more ambitious policy as a definite goal. It is felt that Egypt looks upon even this wider work as being nothing but a stepping stone. The laws which will apply to the minor offenses covered by the proposal now under inquiry are, therefore, of interest because they presage what the general penal legislation is apt to be when extended to all crimes and misdemeanors. It is, in a word, on account of the strategic importance of the present initial step that the matter of the new codes should be taken most seriously.

If it were not for this factor it would really make but little difference what system of criminal laws was applied to the misdemeanors covered by the proposal now submitted to the Powers. These wrongdoings are restricted to such offenses as trafficking in habit forming drugs, trading in white slaves, and resorting to certain forms of bare-faced commercial fraud. In a word, the derelictions envisaged by the diplomatic Notes before referred to fall within a category where the beneficent protection afforded to prisoners by Anglo Saxon traditions and laws could well be replaced by the more stringent procedure applied by the courts of France to those whom the Parquet pursues. Only social derelicts or congenital malefactors are likely to be charged with such soft impeachments as those set forth under those three general headings. The American colony in Egypt has no such elements. Such pariahs are better off in hospitals or in jails than out of them. Any type of laws that would facilitate putting these outcasts under lock and key should be adopted with alacrity, provided matters could be so arranged as not to react upon those constitutional safeguards which Americans look upon as being their birthright.

This unorthodox but most desirable result could readily be obtained by making it clear that the fact that America may perhaps be prepared to submit her nationals to such criminal laws as Egypt may enact in respect of offenses covered by the correspondence in question, in no sense implies that the United States would consent to extend this principle to all crimes or misdemeanors. A grant to the Mixed Courts of general and complete criminal competence would be something so sweeping in its consequences as to be tantamount to abolishing the Capitulations except in regard to fiscal matters and questions of personal status. Lodging this penal jurisdiction in these Tribunals would be, for all intents and purposes, as far reaching in its effect as would be the turning over of Americans to the ordinary Egyptian Courts.

Many careful observers of the Near East recognize the fact that the progressive elimination of the Capitulations is merely a matter of time and of evolution. I do not say that they are mistaken. The world is moving forward. So is Egypt. But the point that I have in the back of my head is that to wipe out the entire criminal jurisdiction of the Consular Courts and to substitute for it Mixed Court general penal competence is to maintain, as against Egypt, the basic principle of Occidental interference in her affairs without at the same time giving Americans any equivalent ark of the covenant, or, to change my metaphor, it is to camouflage the reality so effectively that neither Egypt nor America will be able to get any consolation out of it. In saying this I am of course assuming that the same codes would be applied by both judicial systems and that both corps would be equally fearless, upright, and enlightened. What I mean is that, for all practical purposes, an American would be as much out of his element before a Mixed Court bench composed for example of a Portuguese, a Greek, and an Egyptian, as he would be in a purely Egyptian atmosphere. Theoretically an American has more in common with a Portuguese and a Greek than he has with an Egyptian. But what does this theory mean to the man from the Middle West when he cannot convey his mental reaction to any one of the three? It may be that it is a wall of a thickness of ten inches that separates him from the judge from Lisbon, one of twenty inches that keeps him away from the Athenian jurist, and one of thirty inches that shuts him off from the Cairene. Such differences, however, are merely one of degree. His psychological isolation is no less complete in the one case than it is in the other two.

It might, perhaps, be urged in reply to all of this that the Mixed Courts have been in existence for over fifty years and that they have given most admirable results. They have. They are no longer an experiment. They are a triumphant success. They stand forth as a resplendent example of international cooperation, good will, and saneness. But their competence is for all practical purposes exclusively confined to civil and commercial cases. They have succeeded in this restricted field for the very reasons that make it hazardous to give them criminal jurisdiction.

To elaborate this point would lead me far afield. Suffice it to say that the French codes of substantive and adjective law now applied by this International judiciary admirably answer the needs of Egypt. I am free to say that my eighteen years on this bench have convinced me that the common law could not have given like favorable results. I assert this because the Napoleonic digests are almost incomparable models of pellucid clearness of expression. They lay down general principles in a manner that has the delicacy of touch, the broadness of vision, and the elasticity of application which defy the march of time and the change of environment. And after all, all that society, in the last analysis, requires for the safeguard of commercial life, contractual relationship and business expansion is sane legislation, definitely ordained, readily accessible, and honestly administered. The Mixed Tribunals have nothing to do with matters affecting personal status. They are, therefore, in seven instances out of ten, face to face with litigants whose cases may be passed upon by a study of the exhibits offered in evidence. The Mixed Court Code of Procedure practically does away with parole evidence in more than the foregoing percentage of causes. This means that the "mental reaction" and "psychological isolation" to which I have referred have nothing to do with the overwhelming majority of civil and commercial suits heard by the Mixed Tribunals. I suppose that I should seek to demonstrate the accuracy of this latter statement. I shall not do so, however, as I

do not want to become involved in an analysis of a technical question of comparative law. I prefer to ask my reader to take my statement on faith. I have made it simply and solely to show that I have carefully weighed my words when I affirm in one breath that the Mixed Tribunals have worked out admirably as a civil court and in the next declare that they would not necessarily do so were their competence extended to criminal matters.

The sum and substance of all this is that while the United States would be perfectly justified in facilitating the conviction of moral derelicts and social outcasts through the medium of Latin penal machinery administered by the Mixed Courts, it would, perhaps, be wise that Washington make it clear that its willingness to have such vultures rushed to hospitals or jails in no sense implies that it is prepared to agree, in principle, to the eventual transfer of complete criminal jurisdiction to the Mixed Tribunals.

LETTERS OF INTEREST TO THE PROFESSION

Misconception of the Duty of the States Under Prohibition

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

President Hoover, in his inaugural address, ascribes part of the abuses which have grown up under the Eighteenth Amendment "to the failure of some States to accept their share of responsibility for concurrent enforcement and to the failure of many State and local officials to accept the obligation under their oath of office zealously to enforce the laws." This statement assumes a duty on the part of the States to aid in concurrent enforcement and a duty on the part of State and local officials under their oath of office to enforce the prohibition law. Both of these assumptions are wholly erroneous.

1. The Eighteenth Amendment imposes no duty upon any State to enact laws for the concurrent enforcement of the amendment.

The second section of the amendment gives to Congress and the several States "concurrent power to enforce this article by appropriate legislation."

Even as to Congress this language is permissive and not mandatory, and in that respect is in conformity with the general scheme of the Constitution. Congress is not bound to exercise either wholly or partially any power granted to it by the Constitution. To what extent it shall pass laws in the execution of its powers is a matter for Congress in its wisdom to determine. Congress has the power to enforce the Thirteenth, Fourteenth and Fifteenth Amendments, for example, but it never undertook more than a partial enforcement of their provisions, and has for years refused to take any action for the protection of negroes in their civil rights.

But as for the States the reference to them in section 2 is not even a grant of power. Before the adoption of the Eighteenth Amendment the States had plenary power to regulate traffic in intoxicating liquors within their borders. That power was to a large extent taken from them by the Eighteenth Amendment, and except for section 2 might have been regarded as wholly taken away. The object of the provision for concurrent power, as the Court expressly held in United States v. Lanza, 260 U. S. 377, was to make it certain that the limited power was still left to the States to enact prohibitory laws not inconsistent with the amendment or any law of Congress on the subject. Section 2 contains no implication of any duty imposed on the States to enact such legislation.

2. State and local officials have no obligation under their oath of office to enforce the national prohibition law. The oath to support the Constitution does not give them the power to act as federal enforcement officers. The prohibition law itself provides for its enforcement by federal officers only, except that some state officers are also authorized to perform certain incidental acts in aid of such enforcement. This is as far as the law could go. It is well settled that no federal statute can require state officers to enforce federal laws, that while such officers may be authorized to exercise powers which are incidental to the judicial power of the United States, they are not obliged so to act if they do not choose to do so. Robertson v. Baldwin, 165 U. S. 275.

3. The Constitution of the United States, as is well known, created a dual or federal system of government consisting of two separate sovereignties, granting to the United States certain limited powers and reserving all other powers to the States and the people. Chief Justice Marshall said, in M'Culloch v. Maryland, 4 Wheat. 316, 410, "In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." And Chief Justice Taft said in the Lanza case, "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."

Under this system of government the States owe no duty to the Union, and the Union owes no duty to the States, to enact laws for the enforcement of prohibition, or any other laws within the fields of their respective sovereignties. Federal officials are bound to enforce federal laws and state officials to enforce state laws, but neither State nor Nation is bound to enforce the laws of the other sovereignty. The national prohibition law is a federal law, and hence imposes, and can impose, no duty of enforcement upon States or state officials. The laws which, under article II, section 3, of the Constitution, the President must take care are faithfully executed are the laws of the United States, not the laws of those independent sovereignties of which he does not hold the executive power, and they are to be executed by federal agencies, not state agencies, under his direction as chief executive officer.

Boston, Mass. ALEXANDER LINCOLN,
Formerly Assistant Attorney General of Mass.

How the Jury Should Be Considered

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

Criticism of the jury system for the most part, when reduced to its final analysis, is merely an attempt to reconcile theory with practice. Theoretically, the jury system is explained today on the basis that, in a free government, the people themselves should have the right to the determination of their disputes by their fellow citizens. This concept has been so deeply inculcated in the mind and makeup of Americans that we cannot conceive of any other principle which would not be inconsistent with the very idea of democratic government. It has become an ideal which our national mind is accustomed to regard as a truism.

As a matter of fact, the historical evolution of the jury system discloses that it, in no sense, is based on any such fundamental concept but, on the other hand, "just grew" — not as an ideal, but as a practical solution of the problem of determining disputes. Along with the jury came rules of evidence, and the fact that these rules appeared, and continued in their development, along with the jury system, demonstrates that the jury never has been an entirely satisfactory process for the determination of controversies and that it has always fallen far short of scientific accuracy.

English law and legal institutions have not been the result of an ideal philosophy. Rather, they have been the result of the need for solution of controversies by hard headed practical Englishmen whose sole test of the feasibility of the rules of law or legal institutions depended upon the practical results. There never has been in their jurisprudence, a philosophy of justice; or an ideal principle. The development of their institutions and with it the jury as a legal in-

stitution has been purely historical. Those institutions which served Englishmen well, in a practical way were continued so long as the results were satisfactory. When the results were otherwise, the institution was either abandoned or remodeled.

We in America have lost sight of the English idea. Borrowing the ideals of the French Revolution, "Equality, Liberty and Fraternity," we have in this country established a democratic form of government in order to safeguard and secure those ideals to all people. We have connected them with the then existing political and legal institutions and have since come to think that the institution is a necessary adjunct of the ideal itself. This is what has happened in the case of the jury. We no longer think of liberty or freedom or of any of the ideals of a democratic government and we cannot even think of a democratic form of government itself without thinking that the jury system is a necessary part of it. Conversely we say that when the jury system is dispensed of, we will, at the same time and in the same act, dispense with a democratic government and the ideals which it carries into effect. Justice being one of the ideals of a democratic government, we likewise say that without the jury system, justice among men will no longer exist.

As a matter of fact, a jury is not essential to self government or to any of the ideals of self government nor to the administration of justice. The jury is and should be considered solely as a means to the end and when the end can be better accomplished by other means at a saving of time and expense, or, in other words, when the ideals of justice can be better achieved, we will herald the passing of the jury. For proof of the fact that a jury is not essential to the administration of justice we have to but consider the system of Roman jurisprudence.

In the reported decisions we are now becoming confronted with what is ordinarily referred to as "fact precedents"—controversies which are decided on the facts of the individual case. Likewise, we are coming to the point where "law" and "fact" questions in suits at law are impossible of distinction, and where every question of law ultimately resolves itself into a question of fact. An eminent judge in the middle west once told me that it would be better for the court and bar if no opinions were ever written in the majority of the cases decided, having in mind that ultimately and in their final analysis most of the cases submitted to him turn on the facts of the particular case before him. It is apparent that in such cases the jury is becoming far less essential and of far less service in the determination of the dispute. What the court is doing is deciding the cases according to his ideal of right or justice and sustaining his decision on the facts of the individual case. He is becoming a legal philosopher, deciding cases according to the philosophic ideals of justice, with less regard for rules and precedent, and the verdict of the jury is less binding on him as to questions of fact than ever before.

The reasons for these changes are not obscure. It is impossible for courts to reconcile the myriad rules of law, and seldom will they let a technical rule, or the verdict of a jury operate as an instrument of oppression. Moreover, economic changes have been so rapid as to make it impossible to attempt the application, by analogy, of old rules to situations which were not then dreamed of. New trials and rehearings are in disrepute, principally because of the delay and expense, and courts will make every effort to avoid them, and, I daresay, at the expense of some legal principles.

It is of no avail to advocate either the retention or abolition of the jury system. It will pass, of its own accord, simply because our economic life demands that it be so. The transition will be gradual. What will take its place is difficult to say. What other parts of our judicial system will need to be strengthened or altered is likewise impossible to determine. We are approaching the Roman ideal. Whether our institutions will be as their were, is not important. Strange as it may seem, we are no longer a country of laws and not of men. The restraint of judicial decisions and the verdict of juries, as a control of judges, is rapidly passing. You may call it tyranny, if you please, but it is and will be a tyranny of wise, and I suspect, benevolent men.

BENNETT CULLISON.

Harlan, Iowa.

Booklet on Permanent Court of International Justice

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

Members of the American Bar Association who are particularly interested in international relations may be interested to know that a complete and up to date edition of a booklet on the Permanent Court of International Justice is now available, without charge, upon application to The American Foundation, 565 Fifth Ave., New York City. You might care to call attention to this in one of your announcements or publications.

The booklet gives a record of the negotiations looking toward the adherence of the United States to the Court up to and through the events of last month. The new protocol (embodying Mr. Root's proposal) which is to be offered to our Senate and which, if adopted by the United States and the signatory states, will achieve the adherence of the United States to the Court, is given on page 56 of the booklet.

The booklet also gives a complete record of the Court's work, including a summary of the 13 judgments and 16 advisory opinions given to date. This summary is based on the publications and official documents issued by the Court itself.

We shall be happy to send any members of the American Bar Association (which was one of the first national organizations to endorse the Court) a copy of the booklet upon request.

April 25.

ESTHER EVERETT LAPE,
Member-in-charge.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

of American Bar Association Journal published monthly at Chicago, Illinois, for April 1, 1929.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

Before me, a notary public, in and for the State and county aforesaid, personally appeared Joseph R. Taylor, who, having been duly sworn according to law, deposes and says that he is the Business Manager of the American Bar Association Journal, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to-wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, American Bar Association, William P. MacCracken, Jr., Secretary, 209 S. La Salle Street, Chicago, Ill.

Editor-in-Chief, Edgar B. Tolman, 30 N. La Salle Street, Chicago, Ill.

Managing Editor, Joseph R. Taylor, 209 S. La Salle Street, Chicago, Ill.

Business Manager, Joseph R. Taylor, 209 S. La Salle Street, Chicago, Ill.

2. That the owner is: American Bar Association, Gurney E. Newlin, President, 458 S. Spring Street, Los Angeles, California; William P. MacCracken, Jr., Secretary, 209 S. La Salle Street, Chicago, Illinois; John H. Voorhees, Treasurer, Bailey Glidden Building, Sioux Falls, South Dakota.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

JOSEPH R. TAYLOR, Business Manager.

Sworn to and subscribed before me this 5th day of April, 1929.

MARY A. KING.

(Seal) (My commission expires March 8, 1931.)

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NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Colorado

Opening of Court in New Tenth Circuit

"Know ye that on the first day of April, at the hour of eleven o'clock A. M. on said day, there convened at Denver, in the State of Colorado, a new judicial body known as the Tenth Circuit of the United States Circuit Court of Appeals. A large number of local lawyers attended the opening ceremonies and Hon. Robert E. Lewis, presiding judge, occupied the bench with Hon. John H. Cotteral, associate judge. Two other members of the court are expected to be appointed within the near future.

The event was historic and of particular significance to Denver and Colorado, as the establishment of this new circuit with headquarters in Denver is a distinct tribute to the rapid growth and development of this Rocky Mountain region. The new Tenth Circuit is the first circuit to be added to the Circuit Court of Appeals since the court was established in 1891, and is the first addition to the nine traditional federal circuits since 1866.

At the opening ceremonies, Judge Lewis sketched the history of the court and explained the necessity for the new circuit, introducing Judge Cotteral to the local bar, and swearing in Mr. Albert Trego as clerk of the court. Other federal judges in attendance, were: United States District Judges Symes, Phillips, McDermott and Kennedy.

It so happened that on the same evening the annual banquet of the Denver Bar Association was held at the Brown Palace Hotel and the organization of the new court was then fittingly (yes, and soberly) celebrated. It might be mentioned in this connection that the annual banquet is not regularly held on All Fools' Day and the fact that it did so occur this year had no significance whatever.

At the banquet, addresses were made by Chief Justice Greeley W. Whitford, of the Colorado Supreme Court, and by each of the six federal judges in attendance. No less than seventeen distinguished judges graced the head table and it was indeed an impressive array of judicial talent. Commenting upon this fact, Federal Judge McDermott, of Kansas, in the course of a very clever speech, told the following story by way of illustrating his point: He had been standing on the platform with Bishop Wise of the Episcopal Church, waiting for a train the night before, he said, when the Pullman porter, noting the bishop's reversed collar, addressed the bishop with "Good evenin' Jedge." "I am not a judge," replied the bishop. "Ah begs yo' pahdon, Colonel," said the porter. "I am not a colonel," insisted the bishop. "No sah, General," said the porter. "I am not a general," the bishop answered, "I am a bishop." "Well, sah," said the porter, "Ah knew you was a face-cahd anyway, sah." And the head table, as Judge McDermott pointed out, was full of face cards.

On April thirteenth, the monthly luncheon meeting of the Denver Bar Association was held, the speaker being Malcolm Lindsey, Esq., special counsel for the Denver Water Board. Mr. Lindsey, in a most interesting address, told of the history of the Denver water system and of its present and future problems, both practical and legal. We regret that we cannot report this address, as well as the addresses of the federal and supreme court judges at the annual banquet in detail.

There is but one disappointing item to report on behalf of the Denver Bar Association. As this is being written, word comes that the governor has vetoed the bill, passed at the present session of the Colorado Legislature, increasing the pay of the members of the state supreme court from $5,000 to $9,000 per annum, and there is no likelihood, it seems, that the bill can be passed again over the governor's veto. The fate of the bill increasing the pay of the district judges proportionately is also likely to be as dismal, and Colorado will apparently have to wait for a new governor and another legislature to obtain justice for its judiciary. Bench and bar, out here, however, are both patient and persistent.

JOSEPH C. SAMPSON.

Kentucky

Kentucky Bar's Annual Meeting

The 28th annual meeting of the Kentucky State Bar Association was held at Frankfort, Kentucky, April 4th and 5th, 1929.

The Frankfort Bar Association invited the Kentucky State Bar Association to hold all of its annual meetings at Frankfort at the same time each year that the newly formed Judicial Council meets. The suggestion was referred to the Executive Committee.

The address of welcome was delivered by Mr. Leslie W. Morris, of Frankfort, and the president's address by President Harry B. Mackoy, of Covington, Ky.

The Report of the Committee appointed to promote the passage of the Bar Organization Bill was presented by Mr. J. D. Mocquot, of Paducah, Kentucky, and was discussed by Mr. E. F. Trabue, of Louisville, and others. The Committee was continued. The bill was approved and the Association authorized the Committee to incur any proper expense in its work.

The report of the Law Reform Committee, presented by Mr. Stanley F. Reed, Chairman, of Maysville, Ky., submitted a number of important recommendations and the Association approved the following bills prepared by the Conference of Commissioners on Uniform State Laws: The Motor Vehicle Code, the Business Corporation Act and the Stock Transfer Act.

The Association also approved the Federal Statute providing for waiver of jury trials in misdemeanor cases in Federal courts, and again approved a bill to create the office of Revisor of the Statutes in Kentucky, with powers somewhat similar to those given to such Revisor under the Wisconsin Statute.

Mr. W. L. Porter, Glasgow, Kentucky, spoke on "Sixty Years at the Kentucky Bar." Mr. John B. Rodes, Bowling Green, Kentucky, spoke on "The Legal Story of Mammoth Cave." The address at the annual dinner was delivered by Mr. Paul C. Martin, of Springfield, Ohio.

The Committee on Legal Education and Admission to the Bar, Robert T. Caldwell, Chairman, Ashland, Kentucky, presented an exhaustive and interesting report and recommended that the Court of Appeals amend its rules for Admission to the Bar so as to require a minimum of two years' attendance at a Law School as a condition to such admission. The subject of Legal Education was also discussed by Mr. Robert M. Hutchins, Dean of the Law Department of Yale University.

Mr. E. J. Marshall, Chairman of the Ohio State Bar Association's Committee on Corporation Law, Toledo, Ohio, spoke on "Experiences in the Revision of Corporation Laws." He advocated the liberalization of the corporation statutes somewhat after the manner of the law recently adopted in Ohio.

The Lake Cargo Case was discussed in an address delivered by Mr. J. Vandyke Norman, of Louisville.

The Committee on Casualty & Liability Insurance Legislation, B. R. Jouett, Winchester, Kentucky, Chairman, in its report, recommended that the Legislature adopt an Act requiring a uniform policy in casualty and liability insurance matters.

Judge Hugh Riddell, of Irvine, Ky., spoke on "Some Great Lawyers of Kentucky."

During the meeting, Judge R. H. Hill, of Louisville, was present, and extended an invitation to the members present, who were not members of the American Bar Association, to apply for such membership, and also urged all those present to attend the next annual meeting of the American Bar Association to be held at Memphis, Tennessee, in October, 1929.

In this connection, a written invitation from the Memphis Bar was presented. A number of applications for membership in the American Bar Association were procured.

The officers elected for the year 1929-30 were as follows: President, James Garnett, Louisville. Vice Presidents: first district, John C. Gates, Princeton; second, J. B. Rodes, Bowling Green; third, W. L. Porter, Glasgow; fourth, Howard B. Lee, Louisville; fifth, Kathleen Mulligan, Lexington; sixth, Elmer Ware, Covington; seventh, Clyde Levi, Ashland.

Executive Committee: Stanley Reed, Wallace Muir, Robert G. Gordon, S. Y. Trimble, Leslie Morris, Harry B. Mackoy. Secretary, J. Verser Conner, Louisville; Treasurer, C. M. Harbison, Lexington.

J. VERSER CONNER, Secretary.

Louisiana

Louisiana Bar to Incorporate

The initial step toward incorporation of the Louisiana Bar Association will be taken at the October meeting of the New Orleans Bar Association, it was announced Monday night at the March meeting of the New Orleans association in La Louisiane.

Several out-of-town speakers are to present plans for incorporating the state association, along lines adopted in other states, at the October session, according to the New Orleans Picayune.

R. F. White of Alexandria, president of the Louisiana Bar Association, was the guest of honor Monday night and spoke on "Co-ordination of the Bar." Resolutions endorsing the appointment of a committee to co-ordinate the state and local associations were adopted.

Other members of the state association executive committee who attended, besides Mr. White, were F. G. Hudson, Monroe, and J. D. Barksdale, Shreveport. President Walker B. Spencer presided at the meeting.

Maine

Maine Bar's Biennial Meeting

The regular biennial meeting of the Maine State Bar Association was held at the State House in the capital city of Augusta on January 9. At the forenoon session the routine business of reports of officers and appointment of necessary committees was attended to. At the afternoon session, which was held in the Senate Chamber, reports of committees were received and accepted, reports of Secretary and Treasurer received, new members elected, and officers for the ensuing term chosen.

The feature of the afternoon session was the extremely interesting and timely address delivered by Hon. George R. Nutter of Boston, the retiring President of the Massachusetts Bar Association. This address dealt with some of the more urgent problems facing the profession with special stress upon the subjects of requirements for admission to the bar, professional ethics and judicial procedure.

The final event was the usual banquet held at the Augusta House in the evening. About eighty-five members were seated at the tables. The postprandial exercises were presided over by the retiring President, Erastus C. Ryder, of Bangor, who introduced as speakers, His Excellency Governor Wm. Tudor Gardiner, Judge Martin L. Durgin, of Portland, Hon. Geo. R. Nutter of Boston, Mass., and Associate Justice Luere B. Deasy of our Supreme Judicial Court.

The entire occasion was a success and was thoroughly enjoyed by all the members present. The reports submitted showed the Association to be in a healthy, prosperous condition.

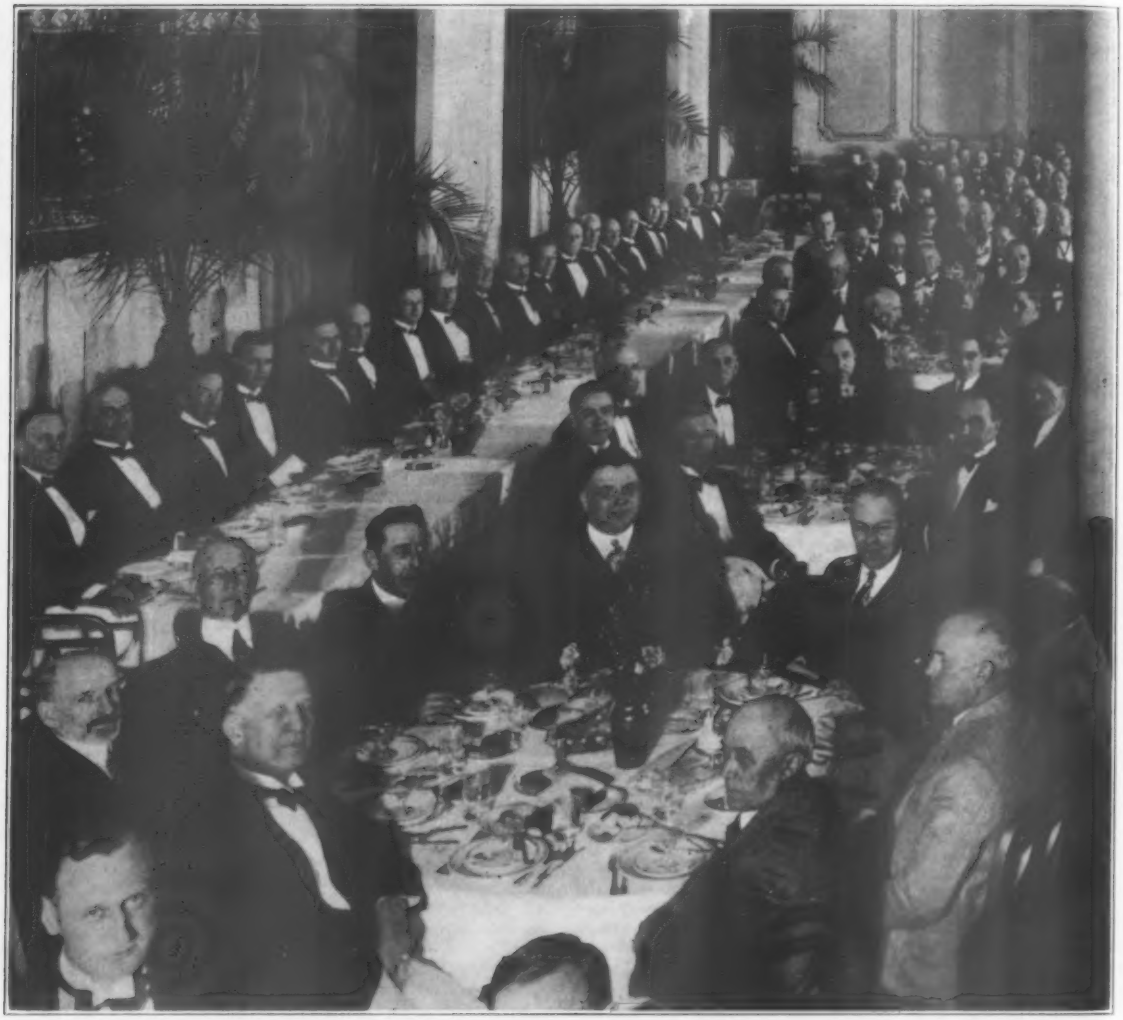
RALPH LEIGHTON, Secretary.

North Dakota

North Dakota Bar Votes to Restore Capital Punishment

The annual meeting of the North Dakota State Bar Association was held at Minot, Sept. 5 and 6, 1928. Addresses were made by Hon. Frederick F. Faville, of the Supreme Court of Iowa, on "The New Civilization and the Lawyer"; by Prof. Wesley A. Sturges, of the Yale Law School, on "Modern Developments in the Practice of Law of Commercial Arbitration," and Hon. Ewing Cockrell, of Missouri, president of the United States Federation of Justice, on "The Successes of Justice." The president's address, by President Aubrey Lawrence, of Fargo, was entitled "Accrued Responsibilities." A committee was appointed to work with a publishing firm which proposes to prepare a North and South Dakota Digest.

On the program was the winning essay on the constitution, in the contest for pupils in the grade schools, which was read by its author, Miss Helen Pravda, and was of high merit. The committee on Citizenship and Americanization, which conducted this contest, was very active during the year, and is again active along similar lines in 1929. The report of the Committee on Criminal Law contained a recommendation for the restoration of capital punishment in the state. A discussion of unusual interest followed, with much difference of opinion, and the associa-



Denver Bar Association Banquet, held on day on which The Tenth Circuit Court of Appeals was organized, April 1, 1929. On account of width of picture, it was necessary to leave out right half. Those in the picture seated at the head table, beginning at the near end, are: William C. Kinkead, representing the Wyoming Bar Association; Judge Hubert L. Shattuck, first Vice-President of the Denver Bar Association; C. J. Roberts, representing the New Mexico Bar Association; Judge Julian H. Moore, of the Supreme Court of Colorado; Judge George T. McDermott, now a member of the Tenth Circuit Court of Appeals; Judge Haslett T. Burke, of the Colorado Supreme Court; Judge Orie L. Phillips, now a member of the Tenth Circuit Court of Appeals; William E. Hutton, former President of the Denver Bar Association; Judge Greeley W. Whitford, Chief Justice of the Colorado Supreme Court; Judge Robert E. Lewis, Presiding Judge of the Tenth Circuit Court of Appeals; State Senator Henry W. Toll, President of the Denver Bar Association; Judge John H. Cotteral, who with Judge Lewis constituted the Bench of the Tenth Circuit Court of Appeals on the day of its organization; Judge Charles C. Butler, of the Supreme Court of Colorado, former President of the Denver Bar Association; Judge T. Blake Kennedy, Federal Judge for the District of Wyoming; James A. Marsh, former President of the Denver Bar Association; Judge Wilbur M. Alter, of the Supreme Court of Colorado; Judge J. Foster Symes, Federal Judge for the District of Colorado; Cass E. Herrington, President of the Colorado Bar Association; Judge John Campbell, of the Colorado Supreme Court; Judge John T. Adams, of the Colorado Supreme Court; and Philip Hornbein, Second Vice-President of the Denver Bar Association.

tion finally adopted the recommendation. The association also endorsed the recommendation that the law forbidding directed verdicts be repealed.

The following officers were elected: President, John H. Lewis, of Minot; Vice-president, Horace Bagley, of Towner; secretary-treasurer, R. E. Wenzel, of Bismarck. These officers, together with the following members appointed by the president, constitute the executive committee: Aubrey Lawrence, Fargo; Frederic T. Cuthbert, Devils Lake; George M. McKenna, Napoleon; P. W. Lanier, Jamestown; G. S. Wooledge, Minot; and Thomas G. Johnson, Kildeer.

The 1929 meeting will be held at Valley City, probably on Sept. 4 and 5.

Ohio

Lawyers and Physicians Foregather

The Allen County (Ohio) Bar Association, following its annual custom, entertained the Allen County Academy of Medicine at a six o'clock dinner, Tuesday, April 9, at Lima, Ohio, according to the Ohio Bulletin and Law Reporter. A large attendance of both professions and the delightful and instructive speech of the Honorable Gilbert Bettman, Attorney General of the state of Ohio, speaker of the evening, made this joint meeting a wonderful success.

The meeting opened with the singing of America. After the informal dinner, President Walter S. Jackson of the Allen County Bar Association welcomed our brothers of the medical profession of Allen county and prophesied a long

and happy life to our annual "breaking of bread" together. President Jackson then introduced Dr. Curtis, President of the Academy of Medicine, who thanked the Allen County Bar Association on behalf of the medical profession and briefly outlined to us the present day need of close contact between the two professions, and closed his short address with introductions of our prominent physicians.

President Jackson then introduced the members of the Bench from Allen county and the surrounding counties who were present at the joint meeting. President Jackson in a few well chosen words introduced the Honorable Gilbert Bettman, Attorney General of the state of Ohio, as the speaker of the evening. Attorney General Bettman spoke on "Government Not Politics."

Former Judge George E. Mills was unanimously elected president of the Cincinnati Bar Association at its quarterly meeting last Tuesday, according to the Ohio Bulletin and Law Reporter. Judge Mills, who will be remembered by the Bar of the state for his scholarly opinions delivered while a member of the Court of Appeals for the first district, succeeds Carl M. Jacobs, Jr., as president, who was called to the chair following the death last fall of Colonel Edward Colston.

Other officers elected by the Association were: First vice-president, Murray M. Shoemaker; second vice-president, William A. Eggers; third vice-president, Oscar Stoehr; fourth vice-president, former Judge Joseph W. O'Hara; secretary, Nelson J. Cohen; treasurer, Philip Hinkle.

The meeting was enlivened by a series of suggestions to the Bar on the part of three judges, and suggestions to the Bench by three practicing attorneys. Appellate Judge Wade Cushing, and Common Judges Chas. S. Bell and Chas. W. Hoffman spoke on behalf of the Bench, while Leo J. Brumleve, J. Louis Kohl and Floyd C. Williams explained what is the matter with the Bench, from the lawyers' viewpoint.

Miscellaneous

The following officers have been elected by the New York County Association of the Criminal Bar, according to the New York Bar Association Bulletin (April): Samuel Feldman, president; LeRoy Campbell, first vice-president; Thomas J. O'Sullivan, second vice-president; Jacob Lasker, third vice-president; Charles W. Gould, secretary; H. Thornton Banks, financial secretary; Walter H. Carpenter, treasurer; Frank Aranow, Frederick L. Hackenburg and Jacob Hamburger, directors for three years. George Gordon Battle, Howard Spellman and Elmer F. Quinn were held over for directors for two years. Joseph D. Edelson, Moses H. Grossman and Thomas J. O'Sullivan have one more year to serve as directors.

At the recent election of officers of the Chattanooga (Tenn.) Bar Association the following were elected: President Con Milligan; Vice-President, Charles Coffey; Secretary-Treasurer, Estes Kefauver; Librarian, Mrs. Aileen McGaughy.

C. H. Penick, was elected President of the Tuscaloosa (Ala.) Bar Association at a recent meeting of that Association. Reuben Wright was named Vice-President and R. C. Price, Secretary. The new executive committee consists of the officers named and Lee Dodson, Fleetwood Rice and T. B. Ward.

W. B. Whitlow was elected President of the recently organized Calloway County (Mo.) Bar Association. Frank P. Baker was elected Secretary.

APPLICATION FOR MEMBERSHIP

To The American Bar Association,
209 S. La Salle St., Chicago, Ill. .....192...

I hereby make application for membership in the Association and certify the following:
(a. I have been a member in good standing of the Bar of the

State (or States) of.....since .....

I am a member of the following Associations of the Bar.....
(b) I am White ☐ Indian ☐ Mongolian ☐ Negro ☐

NAME.....

MAILING ADDRESS.....

CITY and STATE.....

Endorsed by.....Address.....

Check to the order of American Bar Association for $.....is attached.

If this application is made between July 1 and September 30, the check should be for $8.00; if between October 1 and December 31, for $6.00; if between January 1 and March 31, for $4.00, and if between April 1 and June 30 for $2.00.

The annual dues are $8.00. A member receives the monthly American Bar Association Journal beginning with the month of his election, and the report of the annual meeting of the Association. This report is a record of the activities of the Association and contains a list of the members.